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- CRIMINAL LAW** – Sentence – Extended term of imprisonment – Not to comprise suspended sentence – Suspended sentence not to run consecutively to extended term – Matters appropriate to be considered in fixing length of extended term – Criminal Justice Act 1967, s 37. *R v Roberts* .. .. . CA 415
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- CRIMINAL LAW** – Theft – Ingredients of offence – Consent of owner obtained by dishonesty – Facts proved justifying conviction of obtaining property by deception – No bar to conviction for theft – Theft Act, 1968, s 1 (1), s 2 (1) (b), s 15 (1).  
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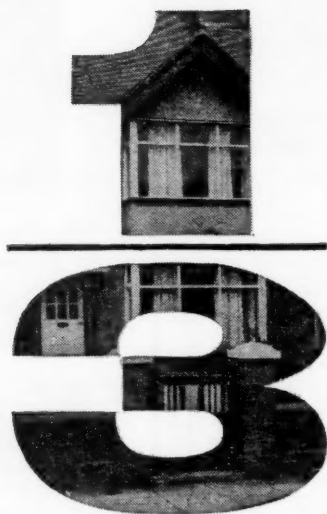
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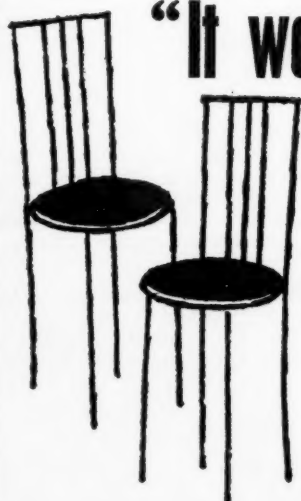
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# JUSTICE OF THE PEACE REPORTS

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## VOLUME 135

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### COURT OF APPEAL (CIVIL DIVISION)

(SALMON, SACHS AND PHILLIMORE, LJJ)

1st, 2nd, 3rd, 29th July 1970

CHESTERFIELD TUBE CO LTD v THOMAS (VALUATION OFFICER)

*Rating—Machinery and plant—Generation of power—Electric motors, hydraulic pumps, and air compressors—motive power derived from electricity supplied to factory—Hydraulic and pneumatic power distributed throughout factory—Rating and Valuation Act 1925, s 24 (1), Sched 3 (1) (a)—Plant and Machinery (Rating) Order 1960, Sched.*

By s 24 (1) of and sched. 3 (1) (a) (now General Rate Act 1967, s 21 (1) and Sched 3) to the Rating and Valuation Act 1925, the following machinery and plant contained in a hereditament shall be taken into account when valuing that hereditament for rating purposes, namely, machinery and plant 'which is used, or intended to be used, mainly or exclusively in connection with . . . the generation, storage, primary transformation, or main transmission of power in or on the hereditament.'

By the schedule to the Plant and Machinery (Rating) Order 1960, the classes of machinery and plant to be deemed to be part of the hereditament are defined by the same words.

Electric motors, hydraulic pumps, and air compressors in the ratepayers' power house deriving their motive power from electricity supplied to the factory produced hydraulic and pneumatic power which was distributed throughout the ratepayers' works and was the motive power which operated their manufacturing machinery.

**HELD:** the words 'generation of power' in the above provisions meant no more and no less than the production of some sort of power; the ratepayers' plant did not merely utilise, convert, or transform electricity which was generated elsewhere and supplied to the factory, but was itself used in connection with the generation of power in the ratepayers' hereditament; and so the plant was rateable.

CASE STATED by the Lands Tribunal.

David Trustram Eve for the ratepayers.

J R Phillips QC and J A R Grove for the valuation officer.

*Cur adv vult*

29th July. The following judgments were read.

**SALMON LJ:** All the relevant facts in this case have been very fully and lucidly set out in the admirable decision of the Lands Tribunal. I need not, therefore, repeat them in any detail. The question which arises on this appeal is whether certain plant, almost all of which is housed in the ratepayers' power-houses at their works in Chesterfield, and is used for the production or storage of hydraulic and pneumatic power, is deemed under s 24 (1) of the Rating and Valuation Act 1925 to be a part of the hereditament and therefore rateable. This depends on whether

the plant belongs to any of the classes specified in Sch 3 to that Act. Paragraph 1 of this schedule, so far as it is material, provides:

'Machinery and plant (together with the shafting . . . appliances and structures accessory thereto) which is used . . . mainly or exclusively in connection with any of the following purposes, that is to say—(a) the generation, storage, primary transformation or main transmission of power in or on the hereditament . . .'

Section 24 (3) of the Act of 1925 provides:

'For the purpose of enabling all persons concerned to have precise information as to what machinery and plant falls within the classes specified in the said Third Schedule [a committee shall be set up by the Minister to] prepare a statement setting out in detail all the machinery and plant which appears to the committee to fall within any of the classes specified in the said schedule.'

Section 24 (5) provides that the Minister may make an order confirming the statement and then the statement as confirmed by the order shall 'have effect as if it were substituted for the third schedule to this Act'. Section 24 (6) provides for the statement to be revised from time to time and for the revised statement, subject to a confirming order, to have the same effect as the original statement. A committee was duly set up under these provisions and a statement prepared, confirmed and revised. Following such revision, another confirming order was made, the Plant and Machinery (Rating) Order 1960, the relevant parts of which provide:

#### 'SCHEDULE

'CLASSES OF MACHINERY AND PLANT TO BE DEEMED TO BE PART OF THE HEREDITAMENT

##### CLASS 1A

'Machinery and plant specified in Table 1A (together with the appliances and structures accessory thereto specified in the List of Accessories) which is used . . . mainly or exclusively in connection with the generation, storage, primary transformation or main transmission of power in or on the hereditament. "Transformer" means any plant which changes the pressure or frequency or form of current of electrical power to another pressure or frequency or form of current, except any such plant which forms an integral part of an item of plant or machinery in or on the hereditament for manufacturing operations or trade processes. "Primary transformation of power" means any transformation of electrical power by means of a transformer at any point in the main transmission of power. "Main transmission of power" means all transmission of power from the generating plant or point of supply in or on the hereditament up to and including:

- (i) in the case of electrical power, the first transformer in any circuit, or where the first transformer precedes any distribution board or there is no transformer the first distribution board;
- (ii) in the case of transmission by shafting or wheels, any shaft or wheel driven directly from the prime mover;
- (iii) in the case of hydraulic or pneumatic power, the point where the main supply ceases, excluding any branch service piping connected with such main supply . . .

##### TABLE 1A . . .

(b) Steam engines; steam turbines; gas turbines; internal combustion engines; hot-air engines; barring engines . . . (h) Pumping engines for hydraulic power; hydraulic engines; hydraulic intensifiers; hydraulic accumulators. (i) Air

compressors; compressed air engines... (k) Shafting, couplings, clutches, worm-gear, pulleys and wheels...

Then there is a list of accessories which includes: 'compressors . . . storage cylinders . . . Pipes, ducts . . . coolers . . . tanks'. It will thus be seen that for the plant in question to be rateable it must fall within Class 1A and also be specified in Table 1A.

This appeal really turns on whether the electric motors, hydraulic pumps and air compressors in the ratepayers' power-houses generate power. If they do, then they and all the other ancillary plant, the subject-matter of the appeal, form part of the hereditament and are rateable. Otherwise they do not form part of the hereditament and are, therefore, not rateable. It is conceded that power is 'any form of energy or force attributable to work'. There is no question but that hydraulic and pneumatic power is produced in the ratepayers' power-houses and is distributed throughout their works as the motive power which operates their manufacturing machinery. The ratepayers, however, contend that, although this power is produced, it is not generated in their power-houses. They seek to draw a distinction between the production and generation of power. Their argument runs as follows. The generation of power consists of the harnessing of energy; this can be accomplished only by a prime mover which produces power from a natural physical, chemical or fossil source of energy. Once power has thus been generated, it exists and is in effect one and indivisible. It can be used as it is, or converted into some other form of power for working machinery. There can, however, be no question of that power generating other power. The electricity which is fed into the ratepayers' hereditament is power which has already been generated. Accordingly, it is being used in the power-houses to operate electric motors which, together with the pumps and compressors, merely transform that electric power into hydraulic and pneumatic power. There can be no question of these latter forms of power being generated in the power-house in which they are in fact produced. It is, however, conceded that if 'prime movers' (e.g. steam or gas or petrol engines) were used to produce the hydraulic or pneumatic power, this would constitute the generation of power. Since, however, electric motors are used to produce the hydraulic and pneumatic power, this power is not generated. I am afraid that I cannot accept this argument. I can understand that the true meaning of the generation of power may be a fruitful source of academic discussion amongst philosophers and physicists. We, however, are concerned with what the words 'generation . . . of power' mean as used in para 1 (a) of Sch 3 to the Act of 1925 and in Class 1A of the Plant and Machinery (Rating) Order 1960. The question, in my view, is what they mean to rating valuers and surveyors, the occupiers of hereditaments and the practical technicians concerned with the design, making and operation of the plant and machinery which the hereditaments contain. I hardly think that the legislature intended to include philosophers or physicists among the 'persons concerned' referred to in s 24 (3) of the Act of 1925. In my opinion no true distinction can properly be drawn between the production and the generation of power for the purposes of the law applicable to rating. Had it been intended to draw such a distinction I should have expected Class 1A of the 1960 order to have made this intention clear. This could have been easily accomplished by including in the order a definition of 'generation of power' in addition to the definitions of 'primary transformation of power' and 'main transmission of power'.

Since Class 1A is clearly intended to cover plant and machinery used for the generation of hydraulic and pneumatic power, I think that it is permissible to take judicial notice of the fact that at least 99 per cent of hydraulic and pneumatic power in this country is now, and was even in 1925, produced by means of electric motors. It would be strange indeed if none of this power was intended to be covered by Class 1A



but only those rare cases, if indeed any exist, in which hydraulic or pneumatic power is produced by means of a 'prime mover'.

In spite of the very skilful presentation of his case by counsel for the ratepayers, it is based, in my view, on the fundamentally unsound proposition that one form of power cannot be used to generate another. If this were true it would follow that the generation of power would seldom occur—certainly in the case of electricity. This could only truly be said to be 'produced' but not 'generated' by the conversion of steam, mechanical, hydraulic or atomic power, into electrical power. I entirely agree with Mr Emlyn Jones when in giving the tribunal's decision in the present case he said:

'for my part I am unable to see any distinction in principle between the generation of electrical power from hydraulic power as in a hydro-electric generating station, and the generation of hydraulic power from electrical power as in the power-houses at the Chesterfield Tube Works.'

Counsel for the ratepayers seeks to gain some support from the definition of 'main transmission of power'. He says, rightly, that rateability for plant used in connection with the main transmission of electrical power stops short at the first transformer or the first distribution board, as the case may be. It follows, therefore, that the ratepayers are not liable for rates in respect of the wires beyond that point, that is to say, the wires leading to the electric motors in the power-houses. How strange he says if, in these circumstances, the motors themselves should be rateable. I am afraid that this does not appear to me to be incongruous if the motors are used, as I think they are, for the purpose of generating other forms of power. I agree that the definition of 'main transmission of power' suggests that, in the case of transmission by shafting or wheels, the type of generating plant contemplated is a 'prime mover'. I do not know why this is so. Nor do I think that it carries the point raised on this appeal very far. I doubt whether it is possible to find any completely logical explanation of the language used in Class 1A or why some pieces of plant and machinery are rateable and others are not. Nor do I think that for the purpose of this case it is necessary to attempt to do so. Counsel for the ratepayers further argues that, even if hydraulic power was generated in the ratepayers' power-houses, and accordingly the motors and pumps used to produce it fall within Class 1A, still they would not be rateable because they are not also specified in Table 1A. They do not, so the argument runs, fall within the definition 'pumping engines for hydraulic power'. The tribunal, which visited the site and also had the advantage of hearing the expert evidence on this matter, found that the motors and pumps were 'pumping engines for hydraulic power'. I can find no reason for disturbing that finding.

We have been referred to a number of interesting cases. So far, however, as I can discern, the only one to throw any flicker of light on the problem which we have to resolve is *W Collier Ltd v Fielding (Valuation Officer)* (1). The decision may well have been right on the facts of that particular case and I would agree that an electric motor is not a 'prime mover' in accordance with the definition of that term in Chambers Technical Dictionary. If, however, the tribunal intended (which I doubt) to lay down the general proposition that an electric motor cannot be used to generate hydraulic or pneumatic power, I could not agree with it.

The only question for us is whether the words 'generation . . . of power' in para 1 (a) of Sch 3 to the Act, and in Class 1A, bear the narrow and, to my mind, artificial meaning for which the ratepayers contend, or whether they mean no more and no less than production of power. For the reasons which I have given, I favour the

(1) (1957), 1 RRC 246; 50 R & IT 218; *affd* CA 122 JP 222; [1958] 1 All ER 694.

latter construction. Before the motors and pumps and air compressors in the power-houses were put into operation there was no hydraulic or pneumatic power on the ratepayers' premises. As a result of operating this plant, these forms of power (which are entirely different in kind from electrical power) came into existence. This seems to me obviously to constitute the generation of power. It might equally well be called the creation of production of power, but in my view it is nonetheless the 'generation . . . of power' within the meaning of those words in para 1 (a) of Sch 3 to the Act of 1925 and in Class 1A. I would, accordingly, dismiss the appeal.

**SACHS LJ:** Having had the advantage of reading the judgments of SALMON and PHILLIMORE LJ and being in agreement with both of them, there is nothing I wish to add beyond emphasising one point. When interpreting the contents of the Plant and Machinery (Rating) Order 1960 the notional dictionary to be used is that of practical men, experienced in the field to which the schedules apply. The decision of the tribunal is fully consistent with the appropriate dictionary having been used and appears to me to be convincing and correct on that basis.

**PHILLIMORE LJ:** This case was well argued by counsel and, in addition, we have had the advantage of a decision of the tribunal of outstanding quality. The argument for the ratepayers was that certain plant situated in the power-house at their works at Chesterfield had been wrongly classified by the tribunal as 'used or intended to be used mainly or exclusively in connection with . . . the generation . . . of power' and consequently rateable under the provisions of Class 1A of the schedule to the Plant and Machinery (Rating) Order 1960. The plant in question derived its motive power from the electricity supplied to the factory at a point or points where the method of supply had itself ceased to be rateable, as a result of the definition of the words 'main transmission of power' also in Class 1A of the schedule. The plant in question produced both hydraulic and pneumatic power, the latter cushioning the hydraulic power which was transmitted in due course to hydraulic presses in other parts of the works.

The argument for the ratepayers was that this plant merely utilised or converted or transformed electrical power and did not generate power. It was said that the generation of power requires a prime mover which electricity is not. It was further said that it would be odd if such plant was rateable since its point or points of supply were not. As to the latter argument I mention it only to dismiss it. When one applies broad definitions to highly complex machinery one is bound to get some odd results, and certainly results which might not have been anticipated.

Counsel for the ratepayers relied on a decision of the president of the Lands Tribunal in *Imperial Chemical Industries Ltd v Owen and Runcorn Urban District Council* (1), where the tribunal analysed and applied the definition of 'power' in the dictionaries and held that power meant 'any form of energy or force applicable to work'. Counsel also relied on another decision of Mr ERSKINE SIMES QC in *W Collier Ltd v Fielding (Valuation Officer)* (2). In that case, dealing with electric motors operating a chain-drive carrying trays for the bread in a bakery and other ancillary machinery, he held that the motors did not generate power within the meaning of that phrase in Class 1A nor were they prime movers within the definition of 'main transmission of power' in the same class. In the course of his decision he referred to the definition of prime mover in Chambers Technical Dictionary as 'an engine or other device by which a natural source of energy is converted into industrial power' and referred to the argument that the instances given did not include electricity. He also referred to the Shorter Oxford

(1) (1954), 48 R & IT 43.

(2) (1957), 1 RRC 246; R & IT 218; *affd* CA 122 JP 222; [1958] 1 All ER 694.

Dictionary for the definition of 'generator' as 'that which generates or produces; especially an apparatus for producing gases, steam or electricity'. His conclusion was that none of those motors could be regarded as machinery or plant used or intended to be used mainly or exclusively in connection with the generation, primary transformation or main transmission of power within the order. He further concluded that power, in the expression 'generation of power', has a technical meaning which is exemplified by the definition of main transmission of power'. These motors do not generate power but are the means by which the electrical power supplied to the hereditament is used. Nor did he think that they could be described as 'prime movers', having regard to the definition in Chambers Technical Dictionary. Thus, said counsel for the ratepayers, the plant in this case does not generate power; it is merely the means by which the electrical power supplied to the factory is used and in converting that power into hydraulic and/or pneumatic power. The generation of power requires a prime mover.

Any decision of MR ERSKINE SIMES QC is to be treated with the greatest respect, and I do not for a moment doubt the correctness of his decision in that particular case. It is to be observed, however, that he was dealing with the operation of machinery by electricity and was chiefly concerned with the transmission of power, and it is only in connection with such transmission that any reference is made to prime movers in Class 1A. If he had referred to Chambers Technical Dictionary for the definition of generator, he would have been referred to electric generator, and to the following: 'a machine for converting mechanical energy into electrical energy'. Now, if a machine which converts one sort of energy into another generates that other, what of an electric motor which produces hydraulic or pneumatic power? This, I think, is the crucial question.

The long and short of it is that the court must make up its mind what is meant by the word 'generate'. If it means generate in the language of the physicist, no doubt it requires a prime mover, but if it merely means 'produce', it must involve any plant in the factory which produces, albeit by the use of electricity, some other type of power such as hydraulic or pneumatic power. When one looks at this particular plant, is it right to say that it is used wholly or mainly in the generation of power?

As always in this type of case the matter is inevitably to some extent one of the first impression. Now I do not doubt that 'generate' in the case of the physicist connotes something actuated by a prime mover. As SACHS LJ said in the course of argument, 'the Victoria Falls is a prime mover', and if power is produced as a result, it is the result of a prime mover. The difficulty is that the Victoria Falls as a prime mover probably actuates a turbine which is a mechanical device and which by the mechanical power it produces, or perhaps I should say generates, acts as a generator and produces electricity. Is this order using the language of the physicist or that of the ordinary man? If the former, no doubt the appeal should succeed.

For myself, however, I think that the latter meaning is to be preferred. Accordingly, in my judgment, 'generate' points to any plant which produces some sort of power on the premises of the particular factory. If that is right, I agree with the tribunal that the plant in question, which produced hydraulic or pneumatic power, generated such power, and accordingly such plant was rateable. I would dismiss this appeal.

*Appeal dismissed.*

Solicitors: *Pinsent & Co*, Birmingham; Solicitor of Inland Revenue.

G.F.L.B

# CHANCERY DIVISION

(MEGARRY, J)

8th, 9th June 1970

Re B (T A) (an infant)

*Infant—Custody—Order of magistrates—Appeal—Further evidence—Discretion of appellate court.*

On an appeal to the High Court from an order of magistrates relating to the custody of a child made under the Guardianship of Infants Acts, 1886 and 1925, where further affidavit evidence dealing with changes in the circumstances of the case which have arisen since the hearing before the magistrates has been filed, if those circumstances have so changed that the substratum of the magistrates' decision no longer exists, then, unless the case is such that it ought to be remitted for a re-hearing, the appellate court may exercise an unfettered decision de novo on the facts as they exist at the time of the appeal. If, however, that substratum still exists, the appellate court must put into the scales the facts found by the magistrates so far as they have not been falsified by the march of events, together with any new facts, and then seek to exercise a discretion in the same way as it appears that the magistrates would have done had the full facts been before them, apart from any respect in which it plainly appears that their discretion was wrongly exercised.

APPEAL from an order of magistrates under the Guardianship of Infants Acts, 1886 and 1925, giving custody of the sole child of a marriage to the wife.

*Holroyd Pearce QC and A H Ward for the father.*

*L L Ware for the mother.*

**MEGARRY J:** This is an appeal from a decision of a magistrates' court dated 22nd September 1969, made under the Guardianship of Infants Acts 1886 and 1925. That decision gave custody of the sole child of a marriage, a daughter then aged rather over 3½ years, to the mother, with £3 a week maintenance. The order was made on a complaint made by the father. The father and mother married on 22nd February 1964. In 1965 there was some unhappiness between the parties. The mother had a short-lived affair with a man, which the father described as being physical but not adulterous. The mother merely called it an association, and the magistrates accepted her explanation. At all events, after a holiday, says the father, it was forgotten.

The girl with whom I am concerned was born on 1st June 1966, and so is now just over four years old. On 3rd April 1968, the parents took, as foster parents, a coloured boy now aged 5½ years on a more or less permanent basis with a view to adopting him. In the summer of 1968, the mother had a deformed stillborn child after a bad labour. She was much affected by the stillbirth, and relations between her and the father deteriorated. The father was at all material times an engineer who was carrying on a farming business. He was accustomed to working long and irregular hours, sometimes going to bed at 9.00 pm, and sometimes at 3.00 am, and the mother felt neglected. This was the only matter seriously disputed before the magistrates, apart, of course, from the custody of the daughter.

After the stillbirth the mother became friendly with two girls who worked on the farm, and with one of them, C, she developed a lesbian relationship. I think that it is pretty clear from the evidence, particularly from that of the mother herself, that this was no mere attitude or attraction, but involved physical sexual acts. The mother and father were then on bad terms with each other. The mother told the father that she was a lesbian and said that she did not love him any more. Finally,

the father obtained a housekeeper who had a small boy, and after the mother had seen and approved the housekeeper she left the matrimonial home, in late January or early February 1969, to go to live with C. She was, she said, 'infatuated' with C, and at the time it seemed that she had no option but to go to live with her.

After the mother left, the father and the housekeeper looked after the daughter and the fostered boy. The housekeeper developed a good relationship with them, although not attempting to act as a mother. While the mother was away the father neglected some pigs on the farm, and on 2nd July 1969 he was convicted in the same court of causing unnecessary suffering to 15 pigs by omitting to give them proper care and attention. Two of the magistrates who sat in that case also sat, with one other, in the present case. Of this offence, the father said that it did not show that he would neglect children, but rather that he would neglect other matters to attend to children.

The mother's evidence was that the lesbian relationship with C was now at an end, although it is not quite clear when it ceased. It seems to have lasted some three or four months. While the relationship existed she knew that she could not get custody of the daughter, and did not try, but when it ended she sought custody of the daughter. The magistrates' decision was primarily based on the mother offering the daughter prospects of a more stable environment than the father. They held that the fostered boy's welfare was irrelevant. They said that they were

'unable to determine whether there was, in fact, a sordid, depraved relationship of sexual activity between the mother and C, or merely an inordinate affection between them.'

The words 'sordid, depraved' have an emotive quality which suggests that the magistrates did not regard dispassionately the pretty clear inference from the evidence on both sides that the relationship was a physically sexual one. There was medical evidence, however, which the magistrates accepted, that the mother's lesbian attitude was attributable to a puerperal depression; and the evidence was that, once over, it was not likely to recur, save after having another baby. The magistrates set out their reasons in nearly seven pages of typed foolscap, and came to the conclusion that the daughter would be better with the mother. Their reasons included references to the alleged financial instability of the father. The father's financial affairs are undoubtedly a little complicated, but I do not think that there is any real evidence to show that he is unlikely to be able to provide properly for the daughter.

Counsel for the father attacked the magistrates' reasoning on a broad front. The main ground of appeal was that their decision was not in accordance with the daughter's welfare and was contrary to her best interests. The magistrates, he said, had totally ignored the injury to the daughter that the separation from the fostered boy would cause. He contended that their reasons related to factors which aided the mother, but neglected some of those which aided the father. There are, indeed, certain passages and some factors which are open to this construction. The magistrates found it 'noteworthy' that whereas the mother had no part in engaging the farm staff, the father engaged C and her friend, and afterwards, when they had gone, engaged two more women whom he later believed to be lesbians. It seems strange that this should be found 'noteworthy'; such a statement either says too little or implies, without explaining, too much. There were other matters, too. In contrasting the physical advantages of the two possible homes for the daughter, the magistrates, instead of considering merely the advantages that were physical and existing, coupled them with the advantages of the daughter being with the mother, and also the mother's intention of purchasing a cottage when the father paid her the money that he owed her. For reasons that will appear I will not here



pursue this matter further. The mother, I should say, has substantial claims against the father in respect of money that she lent him, and so on, and proceedings under the Married Women's Property Act 1882, are now pending. It is common ground that there is at any rate £6,000 due to her. There seems to be no hope of a reconciliation.

The one real point that emerged from the criticisms made by counsel for the father was the magistrates' apparent failure to give proper, or indeed any, overt consideration to the effect on the daughter of transferring her from the home which she had known all her life, from her father, from the fostered boy who had in effect been a brother to her for some 18 months, and from the housekeeper with whom she had a good relationship, to a new home in another part of the country with the mother alone. For a child of three or four this matter is so important that on any footing it merited some express mention.

However, there were some further developments in the case. On 14th January 1970, counsel for the father applied to me, acting for the nominated judge, for leave to adduce further evidence on the appeal from the justices, and counsel for the mother opposed this. This evidence was to be on four points, counsel for the father said, including the resumption by the mother of the lesbian relationship with C, new developments in relation to the father's financial stability, some further medical treatment of the mother, and some psychiatric evidence. I was not familiar with the practice in these cases, and remained so even after enquiry of counsel. In the end I refused the application on the ground that the process of adding new affidavit evidence under these four heads to the magistrates' notes of oral evidence and their reasons would be unsatisfactory, and that an application to the magistrates for a further hearing seemed preferable. I was told that there was no authority on the point, and when asked I gave leave to appeal from my refusal with, I think I said, the greatest of pleasure, since it was time that there was some authority on the point. I am now told that further evidence of this kind relating to events which occur after the hearing by the magistrates, as distinct from new evidence of old events, is in practice pretty freely admitted, although I am not sure that that is so.

In the event, there was no appeal from my decision, but the application was renewed when the appeal from the magistrates came on for hearing on 5th February before the nominated judge, PENNYCUICK J, who has great experience in these matters. He gave leave to adduce the evidence, and gave certain directions. On 4th April, the mother had the daughter on agreed staying access and decided not to return her to the father, and she has been with the mother ever since. The ground given for this was that the father had lost his housekeeper (who had left to get married) and had got another housekeeper without telling the mother. On 20th April, the father moved before FOSTER J for an order for the return of the daughter. The learned judge made no such order, but instead directed affidavits to be filed dealing with the new housekeeper.

Now that the appeal has come on for hearing the result is that in addition to the notes of evidence in the magistrates' court and the magistrates' statement of reasons I have before me 16 affidavits and their exhibits, three of them sworn in January, seven in February and six in April. Since the hearing in the magistrates' court on 22nd September 1969, there have been a number of changes. Thus the mother had changed her home more than once; the father has changed his housekeeper; the daughter is no longer with the father but has been kept by the mother; and there has been a variety of other events. There are thus before me two types of evidence, differing considerably in their quality. First, there is the evidence in the magistrates' court, given *viva voce* and with all that was said subject to cross-examination. The magistrates saw and heard the witnesses, but all that I have is the notes of evidence and the magistrates' reasons for their decision. Secondly, there are the 16 affidavits giving the evidence of witnesses whom I have not seen or heard. This

evidence has not been the subject of cross-examination, counsel on neither side having sought leave to cross-examine. This evidence, of course, was not before the magistrates. What I have to try to do is to give the proper combined weight and effect to two such disparate species of evidence.

In those circumstances two procedural questions of some difficulty seem to arise. First, there is the question of the treatment to be accorded to the affidavit evidence. There are at least three possibilities. First, as counsel for the father initially submitted, I could ignore it all and merely decide whether on the evidence before them the magistrates were right or wrong. This submission, which was largely based on this being an appeal and the issue being whether the magistrates' decision was right, fell a little oddly from the lips of counsel for the party who had sought in the first place to introduce such evidence, but I suspect that he had found it as a whole somewhat disappointing. Secondly, in counsel for the father's alternative submission, I should take into account the affidavit evidence so far as it related to the mother's lesbian tendency and the father's financial stability, but ignore it so far as it related to other matters such as changes in the father's housekeeper and in the mother's home. The third possibility was to take the affidavit evidence fully into account. Of these three possibilities the first must, I think, be wrong. If subsequent events showed plainly that the magistrates' decision would be positively harmful to the daughter, I cannot think that this court would say that the magistrates' decision was right when made and so must be upheld, even though clear evidence had been tendered which showed that to uphold the decision would be disastrous for the daughter. The second possibility also seems insupportable, for the same reason and also because there seems to be no sensible basis for the discrimination. Both the evidence to be admitted and the evidence to be rejected contain elements of bringing up to date factors put before the magistrates. The third possibility seems to be the only proper course that I could adopt, and, indeed, in the upshot I think that counsel for the father really subscribed to this view. Unless I take this course, the probability is that one side or the other will promptly apply to the magistrates for a variation of the order on the ground of changed circumstances; and I think it my duty to attempt to dispose of the case, so far as possible, on the facts as they now are and not as they once were.

On that footing, the second main question arises. In all these cases, there is a substantial discretionary element. In general, the discretion is that of the magistrates, and the appellate court must refrain from substituting its discretion for that of the magistrates: see generally *Re B (an infant)* (1) and *B (B) v B (M)* (2). What, however, is not clear is what is to be done when some of the facts on which the discretion was exercised no longer exist, and where other facts have come into existence which were never before the magistrates. Do these circumstances set the appellate court free to exercise its own discretion anew, or does the exercise of discretion by the magistrates persist, subject to the appellate court making a supplementary exercise of discretion, as it were, on the new facts? Neither counsel for the father nor counsel for the mother greeted with any enthusiasm my suggestion of sending the case back to the magistrates, a course which would at least result in an undivided discretion being exercised on the full current facts, and in those circumstances I do not think that I ought to insist on the parties suffering the expense and delay of any such remission.

Accordingly, I think that I have to do the best I can. Even though RSC Ord 55, r 3 (1), makes it plain that an appeal is by way of rehearing, and RSC Ord 55, r 7 (3) and (5), empower me to draw inferences of fact and make any order that the

(1) [1962] 1 All ER 872.

(2) [1969] 1 All ER 891; [1969] P 103.

magistrates ought to have made, the discretion, as *Re B (an infant)* (1) and *B (B) v B (M)* (2) show, is still that of the magistrates. In my judgment, a distinction should be made. If circumstances have so changed that the substratum of the magistrates' decision no longer exists, then, unless the case is such that it ought to be remitted for a rehearing with all the consequent disadvantages of expense and delay for the parents and the child, I think that there is nothing for it but for the appellate court to exercise an unfettered discretion *de novo* on the facts as they exist at the time of the appeal. But if that substratum still exists, then I think that the appellate court must put into the scales the facts as found by the magistrates, so far as they have not been falsified by the march of events, together with any relevant new facts, and then seek to exercise a discretion in the same way as it appears that the magistrates would have done had the full facts been before them (apart, of course, from any respect in which it plainly appears that their discretion was wrongly exercised).

What seems to me of predominant importance in this respect is the fact that the magistrates have seen and heard the witnesses, and especially the mother and the father, whereas I have not. In these guardianship cases so much may turn, consciously or unconsciously, on estimates of character which cannot be made by those who have not seen or heard the parties, and the characters of the parents is of the utmost importance to the well-being of the child. True, such estimates have to be made in the artificial circumstances of a hearing in court, and often in a short time, but the process of giving evidence, and especially of being cross-examined, tends to be wonderfully revealing. The magistrates, it is true, have made no overt assessment of the mother and father in this respect, although preferring the mother as a witness, but it would be almost impossible for them to ignore this factor. In any case I should be very slow to assume that anything that is not expressly mentioned has therefore not been considered, unless it were a factor of such prominence that it would be unnatural to remain silent about it. I may add that in attaching this importance to seeing and hearing the parties I do not of course forget the importance of what they have done. Acts may be as important or more important than estimates of character based on seeing and hearing the witnesses while giving evidence.

The affidavit evidence seems to me to be of little value in relation to the lesbian aspect of the case. Suspicions aroused by the affidavits of enquiry agents employed by the father are fully met by flat denials and by detailed accounts of the presence of other girls and circumstances excluding any possibility of the resumption of lesbian relations between the mother and C; and, without cross-examination, that is that. I think that counsel for the father very properly accepted this. So far as it goes, the evidence of the changes in homes by the mother and of the father's replacement of his housekeeper does not seem to have greatly affected the claims of either side. I think that the substratum of the case as it stood before the magistrates remains unchanged. So far as I can judge, the mother's present home circumstances, in her parents' substantial house, with her father at work only three days a week and her younger brother, aged 24, working at home, are more satisfactory than those existing before the magistrates' court. In particular, the daughter will not now be being brought up in a manless home. Further, the dependence of the father on housekeepers who may come and go has been demonstrated by the housekeeper who, in her evidence before the magistrates, foresaw nothing to take her away from her post, and yet within a few months she had gone. On the whole, I think that such changes as there have been support the mother's claim.

It is often said that an appellate court should reverse a decision only if satisfied that it is wrong, and not merely because it is not satisfied that it is right. The main

(1) [1962] 1 All ER 872.

(2) [1969] 1 All ER 891; [1969] P 103.



factor that has troubled me is the lack of any demonstration by the magistrates that they gave real weight to the disturbance to a young child of uprooting her from the only home that she had known and from the father and de facto brother. The force of this is somewhat weakened by the disturbance that she suffered when one housekeeper, with whom she got on well, had been replaced by another, and with a consequent change in the children of the housekeeper who had formed part of the household. Furthermore, the daughter has in fact already been uprooted. For over two months now she has been living with the mother, and even though the mother may be open to criticism as to the way in which the change was effected, effected it has been. To restore the daughter to the father now would be to uproot her again, just as she is settling down in her new home. I accept that the magistrates' decision, when made, was open to criticism on the score of an apparent failure to consider the importance of the uprooting element, but I have to deal with matters as I now find them. I also accept that the magistrates' decision is open to other criticisms of lesser importance, including an apparent lack of appreciation of how the father had been managing, to his credit, to keep the home together despite the mother's departure and failure to return. Indeed, I should have found the magistrates' reasons more impressive if they had been more ready to give credit to the father where credit was due; but I cannot see that this lack of readiness invalidates their decision.

On the other hand, the magistrates seem to have had fully in mind that it was the mother who chose to leave the father, her daughter, and her home for some sort of lesbian relationship, although this had a medical explanation. I think that they must also have considered that when that relationship was over it was the mother who nevertheless chose not to return to the father or attempt a reconciliation. The case is one of a mother who was the substantial cause of the break-up of the home, although that does not, per se, mean that she cannot have custody: consider *Re L (infants)* (1) and *Re F (an infant)* (2).

Looking at the case as a whole, I can see much cogency in the criticisms forcefully put by counsel for the father. From time to time I have felt that I might have reached a different conclusion from that reached by the magistrates, at all events on the facts as they stood before them. But I might not, and in any case it was they and not I who saw and heard the parents and other witnesses; and the facts have not remained unchanged. I must loyally follow the principles applicable to those cases and refrain from usurping a discretion which is the magistrates' and not mine. In all the circumstances, on the main ground of appeal I cannot say that I feel satisfied that the decision of the magistrates was wrong.

I must also mention briefly that there was another ground of appeal, namely, that there was a real likelihood of bias on the part of the two magistrates who had taken part in the conviction of the father in relation to the pigs. Counsel for the father did not press this point very strongly, and I do not think that there is anything in it. A judge or magistrate who has heard one case concerning a litigant cannot, without more, thereupon be said to be likely to be biased one way or the other in any subsequent case concerning that litigant. With a constant litigant, indeed, some courts would otherwise soon run out of judges. The magistrates in their reasons flatly deny any actual or potential bias, and point out that at no time during the proceedings did the father raise any objection on this score. I therefore reject this point.

I have not found this an altogether easy or satisfactory case, and it seems to me that the procedural aspects warrant consideration by those more experienced in these matters than I. I have, however, reached the conclusion that there are not sufficient

(1) [1962] 3 All ER 1.

(2) [1969] 2 All ER 766; [1969] 2 Ch 238.

grounds to justify me in disturbing the magistrates' decision, and I accordingly dismiss the appeal.

*Appeal dismissed.*

Solicitors: Adler & Perowne and Aberstones for MacDonald, Oates & Co, Petersfield, Hants; Gibson & Weldon for Burley & Geach, Petersfield.

G.F.L.B.

### COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, FENTON ATKINSON AND MEGAW, LJJ)

21st, 22nd April, 7th May 1970

G (A) v G (T)

*Bastardy—Affiliation order—Application—Putative father under 18—Undertaking to pay maintenance—Appointment of agent to act for him—Validity—Letters by parents to mother—Admissibility in evidence—Affiliation Proceedings Act, 1957, s 2 (1) (b).*

In July 1965 the complainant, a single woman, gave birth to an illegitimate child, the father, the defendant, being then aged just 17. Two months later the complainant began a correspondence with the defendant's parents and received a letter from his father enclosing £1 for the child and promising that he and his wife would send £2 a month. No such monies were paid, but, in July 1966, the complainant received a letter from the defendant's mother enclosing £5 for the baby's first birthday and saying: 'I'm enclosing £5 for you from [the defendant].' No more payments were made and no letters were received from the defendant himself within 12 months after the baby's birth. In affiliation proceedings the parents' letters were admitted in evidence by the justices and an affiliation order was made against the defendant. On appeal to quarter sessions the letters were held to be inadmissible, and on a Case Stated to the High Court, the decision of quarter sessions was upheld. On appeal by the complainant to the Court of Appeal,

**Held:** a man under the age of 18 who was the father of a child could lawfully bind himself to pay money for its maintenance and could lawfully appoint an agent to do it for him; the parents' letters, in particular the mother's letter enclosing the £5, were not admissible in evidence; there was, therefore, no evidence of payments made by the defendant for the baby's maintenance within 12 months next after its birth within s 2 (1) of the Affiliation Proceedings Act, 1957, and the plaintiff's complaint failed.

**APPEAL** by the mother from an order of the Divisional Court affirming the dismissal by quarter sessions of her complaint laid against the defendant under the Affiliation Proceedings Act, 1957, in respect of her illegitimate child.

*Quintin Hogg QC and G B N A Angel for the mother.*

*Bruce Holroyd Pearce QC and I G F Karsten for the defendant.*

*Cur adv vult*

7th May 1970. The following judgments were read.

**LORD DENNING MR:** When a single woman has an illegitimate child and seeks to make the father pay for it, she is under a time limit. Section 2 (1) of the Affiliation Proceedings Act 1957 provides that she must make a complaint to the justices within 12 months from the child's birth; alternatively, she can make her complaint at any subsequent time if she can prove that the man 'has within the twelve months next after the birth paid money for its maintenance'. In the present

factor that has troubled me is the lack of any demonstration by the magistrates that they gave real weight to the disturbance to a young child of uprooting her from the only home that she had known and from the father and de facto brother. The force of this is somewhat weakened by the disturbance that she suffered when one housekeeper, with whom she got on well, had been replaced by another, and with a consequent change in the children of the housekeeper who had formed part of the household. Furthermore, the daughter has in fact already been uprooted. For over two months now she has been living with the mother, and even though the mother may be open to criticism as to the way in which the change was effected, effected it has been. To restore the daughter to the father now would be to uproot her again, just as she is settling down in her new home. I accept that the magistrates' decision, when made, was open to criticism on the score of an apparent failure to consider the importance of the uprooting element, but I have to deal with matters as I now find them. I also accept that the magistrates' decision is open to other criticisms of lesser importance, including an apparent lack of appreciation of how the father had been managing, to his credit, to keep the home together despite the mother's departure and failure to return. Indeed, I should have found the magistrates' reasons more impressive if they had been more ready to give credit to the father where credit was due; but I cannot see that this lack of readiness invalidates their decision.

On the other hand, the magistrates seem to have had fully in mind that it was the mother who chose to leave the father, her daughter, and her home for some sort of lesbian relationship, although this had a medical explanation. I think that they must also have considered that when that relationship was over it was the mother who nevertheless chose not to return to the father or attempt a reconciliation. The case is one of a mother who was the substantial cause of the break-up of the home, although that does not, per se, mean that she cannot have custody: consider *Re L (infants)* (1) and *Re F (an infant)* (2).

Looking at the case as a whole, I can see much cogency in the criticisms forcefully put by counsel for the father. From time to time I have felt that I might have reached a different conclusion from that reached by the magistrates, at all events on the facts as they stood before them. But I might not, and in any case it was they and not I who saw and heard the parents and other witnesses; and the facts have not remained unchanged. I must loyally follow the principles applicable to those cases and refrain from usurping a discretion which is the magistrates' and not mine. In all the circumstances, on the main ground of appeal I cannot say that I feel satisfied that the decision of the magistrates was wrong.

I must also mention briefly that there was another ground of appeal, namely, that there was a real likelihood of bias on the part of the two magistrates who had taken part in the conviction of the father in relation to the pigs. Counsel for the father did not press this point very strongly, and I do not think that there is anything in it. A judge or magistrate who has heard one case concerning a litigant cannot, without more, thereupon be said to be likely to be biased one way or the other in any subsequent case concerning that litigant. With a constant litigant, indeed, some courts would otherwise soon run out of judges. The magistrates in their reasons flatly deny any actual or potential bias, and point out that at no time during the proceedings did the father raise any objection on this score. I therefore reject this point.

I have not found this an altogether easy or satisfactory case, and it seems to me that the procedural aspects warrant consideration by those more experienced in these matters than I. I have, however, reached the conclusion that there are not sufficient

(1) [1962] 3 All ER 1.

(2) [1969] 2 All ER 766; [1969] 2 Ch 238.

grounds to justify me in disturbing the magistrates' decision, and I accordingly dismiss the appeal.

*Appeal dismissed.*

Solicitors: Adler & Perowne and Aberstones for MacDonald, Oates & Co, Petersfield, Hants; Gibson & Weldon for Burley & Geach, Petersfield.

G.F.L.B.

### COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, FENTON ATKINSON AND MEGAW, LJ)

21st, 22nd April, 7th May 1970

G (A) v G (T)

*Bastardy—Affiliation order—Application—Putative father under 18—Undertaking to pay maintenance—Appointment of agent to act for him—Validity—Letters by parents to mother—Admissibility in evidence—Affiliation Proceedings Act, 1957, s 2 (1) (b).*

In July 1965 the complainant, a single woman, gave birth to an illegitimate child, the father, the defendant, being then aged just 17. Two months later the complainant began a correspondence with the defendant's parents and received a letter from his father enclosing £1 for the child and promising that he and his wife would send £2 a month. No such monies were paid, but, in July 1966, the complainant received a letter from the defendant's mother enclosing £5 for the baby's first birthday and saying: 'I'm enclosing £5 for you from [the defendant].' No more payments were made and no letters were received from the defendant himself within 12 months after the baby's birth. In affiliation proceedings the parents' letters were admitted in evidence by the justices and an affiliation order was made against the defendant. On appeal to quarter sessions the letters were held to be inadmissible, and on a Case Stated to the High Court, the decision of quarter sessions was upheld. On appeal by the complainant to the Court of Appeal,

**Held:** a man under the age of 18 who was the father of a child could lawfully bind himself to pay money for its maintenance and could lawfully appoint an agent to do it for him; the parents' letters, in particular the mother's letter enclosing the £5, were not admissible in evidence; there was, therefore, no evidence of payments made by the defendant for the baby's maintenance within 12 months next after its birth within s 2 (1) of the Affiliation Proceedings Act, 1957, and the plaintiff's complaint failed.

**APPEAL** by the mother from an order of the Divisional Court affirming the dismissal by quarter sessions of her complaint laid against the defendant under the Affiliation Proceedings Act, 1957, in respect of her illegitimate child.

Quintin Hogg QC and G B N A Angel for the mother.

Bruce Holroyd Pearce QC and I G F Karsten for the defendant.

*Cur adv vult*

7th May 1970. The following judgments were read.

**LORD DENNING MR:** When a single woman has an illegitimate child and seeks to make the father pay for it, she is under a time limit. Section 2 (1) of the Affiliation Proceedings Act 1957 provides that she must make a complaint to the justices within 12 months from the child's birth; alternatively, she can make her complaint at any subsequent time if she can prove that the man 'has within the twelve months next after the birth paid money for its maintenance'. In the present

case, the mother did not apply to the magistrates for 2½ years; but she alleges that the defendant did pay maintenance for the child within 12 months after the birth. The question is whether she has proved it.

The facts are these: in the summer of 1964, the mother went to work at Butlin's Holiday Camp at Minehead. She was then 32 years of age, unmarried. Her home was in London, but she went down to work at Butlin's for the summer season. The defendant was also working there. His home was in Minehead. He lived at home with his father and mother. He was only 16 or just 17 years of age. The mother went out with the defendant and they had sexual intercourse together on several occasions. She left Minehead on 5th October 1964 and went back home to London. She discovered in December 1964 that she was pregnant; but she did not tell the defendant at that time. She went into King's College Hospital to have the baby. It was born on 6th July 1965. It was a baby girl. Two days later the mother wrote from hospital to the defendant at his parents' address in Minehead. She told him that she had had a baby. He did not write back. Two months later she changed her name by deed poll. She changed it to the defendant's name. She knew that there could never be a marriage between them, but she thought that the child could have its father's name. She wrote to the defendant's parents and got a reply from his father, who wrote in it:

'Why a girl of your age and knowledge finds herself in such a predicament I'll never understand, especially with someone half your age... Believe me, [the defendant] is in no position to help his ruddy self, he only gets boy's money as yet and you must appreciate that's not much... My wife and I will help what little we can and as often as we can to both of you.'

The mother wrote back to the defendant's parents and they replied to her. The defendant's mother sent a parcel for the child, and his father wrote saying:

'The three of us have talked about you a lot and will help as promised all we can. Here's my proposal. With the £1 enclosed, I want you to get the baby a Post Office Savings Account Book... [The defendant] and I will pay in weekly for her... on top of this, my wife and I will send you £2 per month.'

I am afraid that those promises were not kept. No payments were made into the Post Office for the child. The defendant's parents did not send anything until the defendant's mother wrote on 5th July 1966 a registered letter enclosing £5. It arrived on the child's first birthday on 6th July 1966, stating:

'... I'm enclosing £5 for you from [the defendant]. I only wish it was more but every little helps... We are sending on a parcel for the baby.'

Later on, in September 1966, the defendant himself gave the mother £5 for the child, but that was more than 12 months after the birth. He did not pay any more for her. Eventually, in September 1967, the mother went to her solicitors. They wrote to the defendant for payment. He then denied that he was the father. The solicitors then applied for maintenance to the justices at Lambeth.

On 20th March 1968, the justices heard the complaint. The mother gave evidence and produced the letters from the parents. Objection was taken to them; but the justices admitted them. The defendant gave evidence. He admitted sexual intercourse at the material time, but he said that he had never made any payment to the mother during the 12 months after the child's birth, and did not authorise his parents to send any money. He was employed now, he said, in building work.

He had married in June 1967, and his wife was expecting a baby. His mother gave evidence, and said that the £5 which she sent was entirely her money. The justices said that the defendant's mother may have sent the money from her own weekly housekeeping money, but they said that 'for all practical purposes and indeed in law these moneys were sent on his behalf'. They held that the Act was satisfied. They made an affiliation order against the defendant of 25s a week until the child was 16. The defendant appealed. The court of quarter sessions held that the letters from his parents were not admissible in evidence. They, therefore, allowed the appeal and dismissed the complaint. But they stated a case for the opinion of the High Court. The Divisional Court affirmed quarter sessions. They held that there was no evidence that the parents were making the payments on the defendant's behalf. The mother now appeals to this court.

The first question in the Case Stated is whether an infant has the capacity to appoint an agent. I am afraid that I have caused some trouble here because in *Re Shephard (decd)*, *Shephard v Cartwright* (1) I said:

'... an infant cannot appoint an agent to act for him, neither by means of a power of attorney, nor by any other means.'

That statement taken by itself is too wide. It must be read in its context and limited accordingly. The correct proposition is that an infant cannot appoint an agent to make a disposition of his property so as to bind him irrevocably. A disposition by an agent for an infant is voidable just as a disposition by the infant himself would be, so long as it is avoided within a reasonable time after attaining full age: see *Edwards v Carter* (2) and *Chaplin v Leslie Frewin (Publishers) Ltd* (3).

That proposition does not apply here, because we are not concerned with a disposition of property by an infant. We are concerned with a simple act, namely, the payment of money, said to be done on behalf of a defendant aged 17. To such an act, the general principle is, I think, this: whenever a minor can lawfully do an act on his own behalf, so as to bind himself, he can instead appoint an agent to do it for him. Thus, if a minor can lawfully bind himself by a particular contract because it is for his benefit, he can lawfully appoint an agent to enter into it for him. That is what happened in *Doyle v White City Stadium Ltd* (4). Jack Doyle, a professional boxer, under 21, made an agreement through his manager. It was for his benefit and was held binding on him.

Applying this general principle, I first ask myself whether this act (the payment of money) could lawfully have been done by a minor himself on his own behalf. The answer is 'Yes'. A young man under 18, who is the father of a child, can lawfully bind himself to pay money for its maintenance. As LORD MANSFIELD CJ said in *Zouch d Abbot & Hallet v Parsons* (5): 'If an infant does a right act which he ought to do, which he was compellable to do, it shall bind him.' So the defendant could lawfully pay maintenance for this child. It was a right act which he ought to do and which he was compellable to do. Seeing that he could lawfully do it himself, he could lawfully authorise an agent to do it for him. He could tell his bank or his solicitor to pay the money. He could ask his parents to do so. He could put it into the Post Office. In all these cases he is paying it by means of an agent. It certainly binds him so long as it is done with his authority.

(1) [1954] 3 All ER 649; [1955] AC 431.

(2) 58 JP 4; [1891-94] All ER Rep 1259; [1893] AC 360.

(3) [1965] 3 All ER 764; [1966] Ch 71.

(4) [1934] All ER Rep 252; [1935] 1 KB 110.

(5) (1765), [1558-1774] All ER Rep 161; 3 Bunn 1794.



The second question in the Case Stated is whether an infant can appoint 'an agent to act or make admissions contrary to the infant's interest'. I have answered this question in the course of the previous answer. If the act or admission is one which the infant himself could lawfully do or make on his own behalf, he can appoint an agent to do it for him, even though it is against his interest. Thus, the defendant could appoint a bank to make payment for him; or appoint his own parents. But there is no evidence that the defendant ever authorised his parents to pay money for him or to make any admissions on his behalf except insofar as such evidence is contained in the letters which they wrote. So it comes to this: are the letters admissible to prove what is contained in them? This brings me to the third question.

The third question in the Case Stated is whether the letters from the defendant's parents 'were admissible in evidence'. His mother said in her letter to the mother: 'I'm enclosing £5 for you from [the defendant]'. That may be interpreted as meaning: '[The defendant] has handed me £5 to send to you.' If that statement had been made by the defendant's mother on oath, it would have been evidence of a payment by defendant for the maintenance of the child. Not being made on oath, but in a letter—and the mother not being called—it is hearsay; and, according to the common law, it is not admissible. The point is covered by *Wagstaff v Wilson* (1). Mr Wagstaff's attorney wrote two letters to Mr Wilson alleging that he had taken his horse wrongfully. Mr Wilson did not reply himself but a reply was received from his attorneys, who wrote:

'... Mr. Wilson has brought us your letter... respecting a horse belonging to Mr. William Storey, his tenant... We are fully prepared to prove that the horse was legally distrained... by Mr. Wilson's authority...'

The judges of the King's Bench (PARKE, TAUNTON AND PATTESON JJ) held that the letter was not admissible to show that the horse was taken by Mr Wilson's authority. Such being the common law about hearsay, we are not at liberty to depart from it. That follows from the decision of the House of Lords in *Myers v Director of Public Prosecutions* (2). The answer to the third question is, therefore, that the letters were not admissible in evidence.

I would point out that the Civil Evidence Act 1968, has altered the position for the future. These letters would be admissible as first hand hearsay if that Act had been applied to civil proceedings before justices. But it has not yet been so applied.

I would like to say, however, that I am not at all reluctant to apply in this case the rule against hearsay. The mother was so much older than the defendant that, if she seeks to make him pay money for the child, she should prove her case properly. I do not think that the defendant should be bound by his mother's payment of £5 unless it was really sent by his mother on his behalf and with his authority. The best way to prove it would be to call the defendant's mother to say so. Those representing the mother did not call the defendant's mother. It was too risky. His mother would say no doubt that she paid the money. That is the end of it. The mother has failed to prove that the defendant made payment within the 12 months for the maintenance of the child. She is, therefore, barred by the time limit. The appeal should be dismissed.

**FENTON ATKINSON LJ:** Nobody, least of all the defendant himself, has any doubt that he is the father of the child, but, however unmeritorious his attitude in resisting the mother's claim, the law is that he can only be made to pay anything

(1) (1832), 4 B & Ad 339.

(2) 128 JP 481; [1964] 2 All ER 881; [1965] AC 1001.



for the child's maintenance if the mother can prove that he paid money for the child's maintenance within 12 months of the birth.

The justices found in the mother's favour. The defendant appealed to quarter sessions. On the rehearing, the mother gave evidence and, as evidence of payments made by the defendant for the maintenance of the child, produced two letters, one from each of the defendant's parents. The first was from his father dated November 1965, and enclosed £1 for the mother to get a Post Office savings book. The letter stated that the writer and the defendant would pay in weekly for her. The second was from his mother written just within the 12-month limitation period and enclosed £5, expressed to be 'from [the defendant]'. No evidence was called by the defendant. A successful submission was made that, as the defendant was an infant aged 17, he had no capacity to appoint an agent and that, even if he had the capacity to appoint an agent, such capacity did not extend to appointing an agent to make admissions contrary to his interests, and that, therefore, the letters were inadmissible. On appeal by case stated to the Divisional Court, the appeal was dismissed on the short ground that, in any event, there was no evidence that the father or mother acted with the defendant's authority. Accordingly, the court felt that it was unnecessary to deal with the questions posed by the case stated.

For my part, I cannot doubt that there must be circumstances in which an infant can appoint an agent with authority to bind him. Counsel for the defendant is driven to contending that, if a banker or solicitor sent a payment to the mother for the maintenance of the child with the full authority of the infant father, that could not be treated as a payment of money by him so as to satisfy s 2 (1) (b) of the Affiliation Proceedings Act 1957. I cannot think that that is the law. I have no doubt that, if the defendant in fact authorised his father or mother to make a payment to the mother for the maintenance of the child, that would be a payment of maintenance by him within s 2 (1) (b) of the Act. This is just the sort of case in which an infant can authorise an agent to do a specific lawful act on his behalf.

But the existence of the agency must be proved before the agent's admission can be received against the principal. Evidence of the alleged agent's own statement of the fact, whether oral or in writing, would be inadmissible hearsay. Leaving out of account the words used in the two letters which could be read as saying that money was being paid on behalf of the defendant and with his authority, I can see no evidence set out in the case stated of any authority in the parents to act as the defendant's agent. On the material before the Divisional Court, I agree with them that not only was there no direct evidence of any authority vested in the parents to make any admission on behalf of the defendant but also that there were no facts proved from which an agency to make such an admission could possibly be inferred.

Counsel for the mother contends that quarter sessions, having proceeded on a wrong view of the law, namely, that no agency was possible in law, have not considered and certainly have not fully set out in the Case Stated the evidence of the mother covering the period between the birth and the date of the defendant's mother's letter, which evidence he submits, if properly considered, could raise a *prima facie* case of an agency vested in the parents. He invites us to remit the case to quarter sessions for rehearing. But on the facts set out in the Case Stated there is no evidence whatever of any authority in the parents, nor is any such evidence to be found in the very full note of the mother's evidence in the magistrates' court. I see no reason to suppose that any such evidence would be forthcoming if we were to send the case back for rehearing, and I would dismiss this appeal.

**MEGAW LJ:** The only real issue is whether, on the facts found in the Special Case stated by quarter sessions, that court ought to have taken into consideration the

letters of the defendant's father and mother as being evidence of the truth of the matters stated in them. If the answer is 'Yes', then the case must be remitted to quarter sessions; if the answer is 'No', the appeal fails.

The appellant gave evidence that within one year from the birth of the child she received letters from the defendant's father and mother which contained sums of money. That evidence did not avail her so as to establish her right to pursue her claim against the defendant, unless she could show, so as to satisfy s 2 (1) (b) of the Affiliation Proceedings Act 1957, that at least one of the sums of money received by her was money paid by the defendant for the maintenance of the illegitimate child. The onus was on the mother to make out a *prima facie* case that a payment, coming from the parent, was a payment which was, made with, at least, the knowledge and consent of the infant defendant who is the putative father. For that purpose, for obvious reasons, she desired to rely on the contents of the letters, rather than to call the parents as witnesses in the hope that they might give oral evidence to the same effect. As it was not in dispute that the letters were letters written by the defendant's father and mother respectively, there was no problem of formal proof. The mother could rely on the fact that the letters had been written by these persons and on the fact that they had contained sums of money. But that was of no use to her unless she could also put the letters in evidence as being proof—*prima facie* proof—as against the defendant of the truth of the statements in the letters. Part I of the Civil Evidence Act 1968 had admittedly no application in this case. Here the contents of the letters could be used by the mother as evidence against the defendant of the truth of the facts stated therein if, but only if, the statements by the parents in the letters could be treated as admissions made by the defendant's parents as being persons who were, expressly or by implication of the law, authorised to make admissions on the defendant's behalf.

Is there any implication of law—any presumption—that a parent, merely because he or she is a parent, is a person by whose statements the infant child of such parent is bound? I know of no such principle of law, even where—as I think is not the case here—the admission can be said to have been for the benefit of the infant. In Professor Cross's book on Evidence, under the heading 'Vicarious Admissions', I find no suggestion, either directly or by analogy, that there is any such principle in English law. Indeed, I think that it is contrary to the whole tenor of English law, and it would be productive of many surprising and undesirable consequences if it were to be so.

The relevant question, therefore, is whether there was any evidence, apart from the mere fact of kinship, on which it could have been held that the defendant's parents, in writing the respective letters, were agents for the defendant, acting within their authority as such, for the purposes of making admissions on his behalf. If the contents of the letters themselves cannot be looked at for the purpose of establishing such agency, in my judgment this appeal must fail. There was in the facts found in the case stated no such evidence as laid any foundation for the proposition that there was such agency or authority. There is no reason to suppose that before quarter sessions the mother was precluded from adducing any evidence which she wished to adduce to lay that foundation. Even if one were to look at the notes of evidence in the magistrates' court—although I think that the parties are bound by the facts as they appear in the case stated—I am unable to see that there is any such foundation.

Hence the mother can succeed only if, as is indeed contended on her behalf, the statements made by the parents in their letters can themselves be looked at in order to establish that the writers of the letters were authorised by the defendant to make admissions on his behalf. This contention involves the proposition that the court may treat the letters as evidence of the truth of the matters stated therein for the very purpose of laying the foundation which has to be laid before the letters may be treated

as evidence of the truth of the matters stated therein. In other words, an assumption would have to be made as an essential step in proving the very facts which are essential to enable that assumption to be made. To me it seems clear that neither logic nor law permits a litigant to hoist himself up by his own boot-straps in this manner.

I have referred earlier to the admitted fact that Part 1 of the Civil Evidence Act 1968 does not apply to this case. It does not apply because, although by its terms it relates to all proceedings in any court, the necessary order to bring the relevant provisions of the Act into effect in relation to proceedings in magistrates' courts has not yet been made. If such an order had been made, and if the rules to be made in relation to magistrates' courts were to contain similar provisions to those which have been made in respect of proceedings in the Supreme Court (see RSC Ord 38, r 29), the court would have had a discretion to admit the letters as evidence of the truth of their contents, if in all the circumstances it thought that it was just so to do. In the present case it may very well be that the court would have thought that it was just so to do. For myself, I wish that the court had that discretion. But the fact that the court would have had a discretion to admit this evidence if the Act had been applicable is not a valid ground for admitting the evidence in proceedings in a court where the pre-existing law admittedly still remains unaffected by the recent Act. I would dismiss the appeal.

*Appeal dismissed.*

Solicitors: *Meaby & Co; Cartwright, Cunningham.*

P.P.

### HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON, LORD GUEST AND LORD DIPLOCK)

13th, 14th, 15th, 16th July, 5th, 6th October, 11th November 1970

#### MARGATE CORPORATION v DEVOTWILL INVESTMENTS LTD

*Town and Country Planning—Permission—Refusal—Authority required to purchase land—Compensation—Assessment.*

The respondents, owners of a piece of land, were refused by the appellants, the local planning authority, outline planning permission to develop the land for residential use, the ground of refusal being that part of the land would be required for the construction on it of a by-pass to an existing busy road. The respondents served a notice under s 129 of the Town and Country Planning Act, 1962, requiring the appellants to purchase their interest in the land. The appellants agreed to purchase the land, and the respondents became entitled to compensation on the basis that the land was being compulsorily acquired. The Lands Tribunal assessed the amount of compensation at £13,500, and the appellants appealed.

**Held:** while an assumption had to be made that the respondents' land was not going to be acquired so that a by-pass should be constructed on it, it was not to be assumed that there would be a by-pass in some other place leaving the respondents' land free for residential development; all the facts and circumstances would have to be considered on the evidence, and the amount of compensation to be awarded would depend on the value of the permission that might reasonably have been expected.

**APPEAL** by Margate Corporation from an order of the Court of Appeal (RUSSELL and WINN LJJ, LORD DENNING MR dissenting), reported 133 JP 300, dismissing an appeal by the corporation from a decision of the Lands Tribunal.

*D G Widdicombe QC and R W Bell for the appellants.*

*Anthony Cripps QC and B A Marder for the respondents.*

Their Lordships took time for consideration.

11th November. The following opinions were delivered.

**LORD REID:** For the reasons given by my noble and learned friend LORD MORRIS OF BORTH-Y-GEST I would make the order which he proposes.

**LORD MORRIS OF BORTH-Y-GEST:** On 2nd September 1965 the respondents, as owners of a piece of land in Birchington in the borough of Margate, applied to the appellants (as the local planning authority) for outline planning permission to develop the land for residential use. The land has an area of approximately 1.35 acres; in part it fronts on a road called Canterbury Road and in part it extends to the rear of numbers 245 to 249 Canterbury Road. The land has no buildings on it. It formed part of an area allocated for residential use in the Thanet town map which was part of the current development plan for the county of Kent and which was approved by the Minister of Housing and Local Government in 1958. On 1st October 1965 the appellants refused permission. The refusal was stated to be on the ground that part of the land would be required for road improvement works to Canterbury Road (designed to by-pass Birchington Square) and that residential development of the land would be premature until it was possible 'to finalise details of the improvement scheme'. No such road improvement works to Canterbury Road were shown on the development plan.

It is provided by s 129 of the Town and Country Planning Act 1962 that where on an application for planning permission to develop any land permission is refused (or is granted subject to conditions) and if an owner of the land claims (inter alia) that the land has become incapable of reasonable beneficial use in its existing state and cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which planning permission has been granted (or for which the local planning authority or the Minister has undertaken to grant planning permission) he may serve a notice (called a purchase notice) requiring the appropriate council (of the county borough or county district in which the land is situate) to purchase his interest in the land. On 26th November 1965 the respondents served such a notice. On 24th February 1966 the appellants served a notice (see s 130 (1)) stating that they were agreeable to purchase the land and stating that the district valuer had been asked to negotiate the terms of the acquisition. The result of this was (see s 130 (2) of the Town and Country Planning Act 1962) that the appellants were deemed to be authorised to acquire the respondents' interest compulsorily (in accordance with the provisions of Part V of the Act) and to have served a notice to treat in respect thereof on the date of service of their notice. The respondents became entitled to receive compensation on the basis that there was compulsory acquisition of their land. The amount of the compensation was for the Lands Tribunal to determine. The respondents claimed the sum of £16,000. The decision of the Lands Tribunal (given on 2nd October 1967) was that the amount of compensation payable was £13,500.

The appellants, contending that the decision was erroneous in point of law, applied to the Lands Tribunal to state and sign a Case for the decision of the Court of Appeal. They moved the Court of Appeal for an order that the Case be remitted to the Lands Tribunal so that they would assess the compensation according to the principles to be laid down by the court. The Court of Appeal by a majority (RUSSELL and WINN LJJ; LORD DENNING MR dissenting) affirmed the decision of the Lands Tribunal and dismissed the appeal. Leave to appeal to your Lordships' House was given on the undertaking of the appellants not to seek to disturb the orders for costs made by the Court of Appeal and by the Lands Tribunal.

The sole question which arises is whether the decision of the Lands Tribunal was based on any error of law; if it was, then (unless the parties reach an agreement) the matter must be remitted so that a new decision based on a correct approach may be made.

Questions of disputed compensation are determined by the Lands Tribunal in accordance with the provisions of the Land Compensation Act 1961. Among the rules laid down by s 5 are the rules, (i) that no allowance is to be made on account of an acquisition being compulsory, and (ii) that the value of the land is to be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise. It was common ground that the present case is not covered by s 6 of the Act. For the purpose of assessing compensation in respect of any compulsory acquisition certain assumptions (see s 14) are to be made. These are such of the assumptions under ss 15 and 16 as are applicable. It is common ground that certain assumptions which are set out in s 16 are applicable in this case. By s 16 it is provided as follows:

'(2) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of an area shown in the current development plan as an area allocated primarily for a use specified in the plan in relation to that area, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development which—(a) is development for the purposes of that use of the relevant land or that part thereof, and (b) is development for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be . . .

'(6) Where in accordance with any of the preceding subsections it is to be assumed that planning permission would be granted as therein mentioned—(a) the assumption shall be that planning permission would be so granted subject to such conditions (if any) as, in the circumstances mentioned in the subsection in question, might reasonably be expected to be imposed by the authority granting the permission, and (b) if, in accordance with any map or statement comprised in the current development plan, it is indicated that any such planning permission would be granted only at a future time, then (without prejudice to the preceding paragraph) the assumption shall be that the planning permission in question would be granted at the time when, in accordance with the indications in the plan, that permission might reasonably be expected to be granted.

'(7) Any reference in this section to development for which planning permission might reasonably have been expected to be granted is a reference to development for which planning permission might reasonably have been expected to be granted if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers.'

The decision of the Lands Tribunal contains a careful summary of the evidence which was given concerning housing and road conditions in Birchington. I need only refer to some of the matters to which the evidence was related. There was evidence that there was pressure for residential land and that the allocation for the six to 20 years period was nearly exhausted. There was evidence that in 1961 outline planning permission had been granted for the development of an estate called Yew Tree estate (which has an area much larger than that of the land now in question) and that detailed approval for its development had been given in 1962 or 1963. That development involved permitting access on to Canterbury Road at a point a few hundreds of yards from the location of the respondents' land and nearer to the main shopping area which lies northward of Birchington Square. Through that square



there runs a trunk road. Canterbury Road is that part of the trunk road which runs through Birchington. It carries a heavy load of traffic. Some of it is purely local; some of it comes from London or elsewhere and passes through to Margate. On certain parts of the road the sight lines are admittedly bad. There has, however, for some years been a project to construct a by-pass. This was in mind when, and was the reason why, the respondents were refused planning permission in 1965. It was in mind at the time when approval was given for the development of the Yew Tree estate. The projected by-pass will take the through traffic out of the centre of Birchington; it will do so by a loop to the south east. It will diverge from Canterbury Road at the very place where the lower part of the respondents' land fronts on to Canterbury Road. It will traverse and absorb the greater part of the area of the respondents' land. Although it is not yet known whether sanction for the project will or will not be forthcoming this has no materiality in regard to the issues which the Lands Tribunal had to decide. This is because the provision in s 16 (7) of the Act of 1961 has the result that the Lands Tribunal must decide what planning permission might reasonably have been expected to be granted if no part of the respondents' land were proposed to be acquired by any authority possessing compulsory purchase powers. The project or hope or expectation of having the by-pass that is in fact in contemplation must therefore be eliminated from consideration. It follows that having regard to the facts and circumstances of the present case there is no need for the application of the principle which in the Privy Council in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* (1) was expressed in the words:

'Compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.'

There could be no increase in value of the land now in question due to the construction of a by-pass on it if no by-pass on it is to be constructed. Even if the current project or plan for the by-pass could be described as a scheme its existence must for present purposes be ignored. So also if the decision of the appellants in 1966 to accept the respondents' purchase notice is regarded as having been made because they had a scheme or plan to acquire the respondent's land so as to construct a by-pass on it—that circumstance must be ignored. The Lands Tribunal had to proceed on the footing that the respondents' land had been available for residential use. Beyond this they had to assume (by reason of what was shown on the current development plan) that planning permission would have been granted for development for residential use. They had to decide what planning permission for such development might reasonably have been expected to be granted. In assuming that planning permission for residential use would have been granted they had to assume that such permission might have been granted subject to conditions and, if that were so, that the conditions would have been such as it might reasonably have been expected would have been imposed.

The task of the Lands Tribunal was therefore to give consideration to all the relevant facts and circumstances concerning the locality and on the footing that the respondents' land would have been available for and would have been the subject of planning permission for residential use (and would not be taken for a by-pass) to decide what planning permission (and subject to what, if any, conditions) the respondents might reasonably have expected to receive. Having reached decision on that matter the task of the Lands Tribunal was to assess the fair and reasonable compensation that the respondents should receive for the compulsory acquisition of their land when endowed with such planning permission.

(1) [1947] AC 565.

I need not set out the details of the plans or arrangements which were suggested by the parties. The respondents contended that planning permission could reasonably have been expected (at the date of the notice to treat) for the immediate residential development of their land on the basis of a lay-out which they put forward. That suggested lay-out (as set out on a drawing that they put in evidence) was for the erection of 20 houses with an approach road to them leading out from Canterbury Road. The appellants' view had originally been that no planning permission or at any rate no permission involving access on to Canterbury Road could reasonably have been expected but accepting that some immediate development (by which I think was meant some permission that was not deferred permission) might have been allowed by the Minister on appeal their contention (before the Lands Tribunal) was that the only immediate planning permission that could reasonably have been expected was for the erection of nine houses which would have a temporary access on to Canterbury Road but that further development might have been allowed at a later date when adjoining land lying behind the respondents' land came to be developed and when suitable access became available as a result of such development. The total number of houses on this basis (as set out on a drawing that they put in evidence) would approximate to 20.

There was evidence as to valuation. If planning permission could reasonably have been expected as the respondents contended then on the basis of their evidence as to valuation their valuation was £16,000. If planning permission could only reasonably have been expected as the appellants contended then on the basis of their differing evidence as to valuation their valuation was £8,200. The tribunal made no finding as to valuation on the basis of planning permission as contended for by the appellants but as regards figures of valuation expressed a preference for those of the respondents over those of the appellants.

The decisions to be made by the Lands Tribunal were decisions in the field of fact. Some of the witnesses appear to have felt that they were asked to apply their minds to situations having an unreality only to be expected in fairyland. I do not think that their approach should have been so hesitant. Their evidence had to be directed to the realities of the conditions that existed and to the actual facts of the period so that the Lands Tribunal should be assisted to reach decision on the basis of the assumptions that had to be made. Even if the appellants had concluded that the problem of road congestion was to be solved by their projected by-pass they were not precluded from expressing an informed view on the question whether, if that by-pass could not be constructed, there were or were not any other ways of dealing with the problem of road congestion and if so what they were.

The question that arises is whether the decision of the Lands Tribunal was erroneous in point of law. It would be so if based and founded on an erroneous legal proposition. The actual decision was that:

'at the date of the deemed notice to treat planning permission might reasonably have been expected for immediate development of the whole of the subject land.'

But it is essential to see what were the steps which led to this decision or the propositions on which it was founded.

In the decision of the Lands Tribunal reference was made to a dictum of LORD ASQUITH OF BISHOPSTONE in *East End Dwellings Co Ltd v Finsbury Borough Council* (1). In the course of his speech in that case LORD ASQUITH made the general observation:

'If one is bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and

(1) 115 JP 477; [1951] 2 All ER 587; [1952] AC 109.



incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.'

My Lords, even apart from the respect which knowledge of the authorship of the words would command I cannot imagine that anyone would question their soundness. After a quotation of the words the decision of the Lands Tribunal contained the following passage:

'LORD ASQUITH was there dealing with quite different legislation, but the dictum I have quoted seems to me to be apposite in the present case. I am bidden to assume that the subject land is not proposed to be acquired by an authority having compulsory powers. The inevitable corollaries of this seem to me to be as follows: 1. There can be no by-pass on the subject land; 2. There can therefore be no by-pass on the line at present proposed; 3. But since there is urgent need to take the traffic out of Birchington Square, it must be assumed that a by-pass is proposed on some other line; 4. This other line can only be a line which leaves the subject land inside the by-passed area, for I am satisfied that the position of the subject land in relation to Birchington Square and existing development south of the square makes any other conclusion impossible.'

The decision proceeded on the basis that those were 'inevitable corollaries' of the assumption that the subject land was not proposed to be acquired by an authority having compulsory powers. In a later passage it was recorded that Mr Sewell, the borough engineer and surveyor and town planning officer

'himself was prepared to consider whether widening of Canterbury Road on the side opposite to the subject land would be possible. He was prepared to assume such widening as part of his fairland. Once such an assumption is entertained I cannot see why the more sensible assumption of a by-pass in a different position should not be made.'

In my view these passages reveal an error of approach. An assumption had to be made that the respondents' land was not going to be acquired so that a by-pass should there be constructed—but it was in no way an inevitable corollary that there would be a by-pass on some other line and in some different position. If there was not to be a by-pass on the respondents' land it by no means followed that there would inevitably be a by-pass somewhere else. There might be or there might not be. It might have been possible to have another route for a by-pass; it might have been quite impossible. It would be a question depending on topographical and various and many other factors whether there could be a by-pass somewhere else. It would be for consideration whether any alternative by-pass was or was not possible or probable and further whether its construction was or was not likely. These matters could not rest on any assumptions but rather on an examination of all the evidence. Nor could the enquiry (as to what planning permission might reasonably have been expected) depend only on the view taken as to one or other or some only of the relevant factors. Although I consider that it was erroneous to assume positively that a by-pass on an alternative site would have been constructed I think that it would be wrong to proceed on the basis that if the appellants were denied the opportunity of dealing with their road problem in the way that they had planned and thought best they would abandon all hope of solving their problem and give it no further consideration. I cannot accept the submission that as a matter of law the Lands Tribunal had to proceed on the basis that any relief of traffic congestion in Canterbury Road in the foreseeable future was to be ruled out. It would, however, be very relevant to enquire whether the initiation and carrying out of any alternative plan would or would not have been likely.

The requirement that the possibility of a by-pass on the site of the respondents' land was to be eliminated had the consequence that the enquiry had to be on the basis that one expected way of dealing with road congestion problems must be ruled out. There would have to be new examination of the problem. Were there then some other ways? If so what were they—and how effective would they be? Would it have been practicable to effect some road-widening? Could some traffic regulatory adjustments have been made? Within what period of time might some improvement of road conditions have been made? Even if the problem of relieving traffic congestion proved to be baffling—what planning permission for house building might reasonably have been expected? Was there a housing shortage which presented an urgent and serious problem? If the need for homes was pressing, might permission for house building on the basis desired by the respondents have been given even at the cost of adding or adding temporarily to traffic congestion and traffic hazards? How considerable would the added traffic volume be? Was it reasonably to have been expected (on the basis that the respondents' land was not to be taken for a by-pass) that the Minister would have granted unqualified permission for the development as planned and at the time as planned by the respondents or was it reasonably to have been expected that there would be some, and if so what, different permission for development—the difference being in relation to the location of the houses and the time of their erection? All the many relevant facts and circumstances would have to be considered before answer could be given. The amount of compensation to be awarded would depend on the value of the permission that might reasonably have been expected.

The matter must in my view be remitted to the Lands Tribunal for new consideration on the lines that I have indicated. It will still be open to the respondents to contend that in the light of all the actual facts of the situation (but on the basis that there was to be no by-pass on the line as projected by the appellants) it was reasonably to be expected that planning permission to build houses in accordance with their plan would have been forthcoming. It will still be open to the appellants to contend that no planning permission to do more than was covered by their suggestions would reasonably have been expected or would have been forthcoming.

For these reasons I would allow the appeal and without making an order as to costs in this House remit the case for consideration by the Lands Tribunal.

**LORD HODSON:** I agree with the opinion expressed by my noble and learned friend LORD MORRIS OF BORTH-Y-GEST. I would allow the appeal and without making an order as to costs in this House remit the case for consideration by the Lands Tribunal.

**LORD GUEST:** I had prepared an opinion in this case, but having read that of my noble and learned friend LORD MORRIS OF BORTH-Y-GEST I realise that my opinion adds nothing to his. Accordingly, for the reasons given by him, I would allow the appeal and send the case back to the Lands Tribunal.

**LORD DIPLOCK:** I agree with the opinion expressed by my noble and learned friend LORD MORRIS OF BORTH-Y-GEST and with the order that he proposes.

*Appeal allowed.*

Solicitors: Sharpe, Pritchard & Co; Barlow, Lyde & Gilbert, for Girling, Wilson & Harvie, Margate.

G.F.L.B.

DURHAM ASSIZES

(CANTLEY, J)

10th, 11th June 1969

R v McKENZIE

*Criminal Law—Forgery—Acknowledging a recognisance in the name of another—Recognisance not demanded by person lawfully authorised—Forgery Act, 1861, s 34.*

*Road Traffic—Driving with blood alcohol above prescribed limit—Arrest without warrant—Powers of police to detain thereafter—Road Safety Act, 1967, ss 1, 2 (2), 2 (4), 3 (1), 4.*

M, while driving a motor van, was involved in a collision. A police officer in uniform required him to provide a specimen of breath for a breath test, which proved positive. M was thereupon arrested and taken to a police station where a second test also proved positive. He then gave a specimen of his blood for analysis. The officer in charge of the police station released him on his recognisance of £25 to appear at the police station at a later date. M signed the recognisance in the false name 'David Grey'. On his trial on indictment for acknowledging a recognisance in the name of another, contrary to the Forgery Act, 1861, s 34,

HELD: as he had been arrested under the provisions of the Road Safety Act, 1967, the powers of the police to detain him were restricted to those prescribed by s 4 of that Act and they had no right to require him to enter into a recognisance as a condition of his release; accordingly, the purported recognisance was not a recognisance within the Act of 1861, and M had not committed an offence under that section.

SEMBLE: A person arrested under the provisions of the Road Safety Act, 1967, is not 'a person taken into custody for an offence' within the contemplation of Magistrates' Courts Act, 1952, s 38.

TRIAL ON INDICTMENT.

The defendant, Emmanuel McKenzie, was charged on indictment that he on 20th April 1969 acknowledged a recognisance in the name of another person, David Grey, without lawful authority or excuse, contrary to the Forgery Act 1861, s 34. At the close of the case for the prosecution counsel for the defendant submitted that on the evidence adduced by the prosecution this offence had not been committed.

*J R Johnson* for the prosecution.

*James Harper* for the defendant.

**CANTLEY J:** The question I have to decide arises under s 34 of the Forgery Act 1861—acknowledging a recognisance in the name of another person without lawful authority or excuse. The evidence is that the defendant acknowledged a recognisance which was, or purported to be, entered into under the Magistrates' Courts Act 1952, s 38 (2), in the name of another person, David Grey. No lawful authority or excuse for doing so has been suggested. It is contended on behalf of the defendant that in the Forgery Act 1861, s 34, the words 'any recognisance', must refer to some valid recognisance into which he might lawfully be required to enter. I have not been referred to any authority for this proposition, but the prosecution has not, as I understand it, sought to argue the contrary and I am of opinion that it is correct. Mr Johnson for the prosecution contends that this recognisance was a valid one, into which the defendant was lawfully required to enter as a condition of being released from custody.

The facts established by the evidence at the close of the prosecution case are these: On 20th April 1969 the defendant was driving a motor van which was involved in a collision. He was required to undergo a breath test, which test was positive. He was thereupon lawfully arrested and taken to the South Shields Police Station, where he

was given an opportunity to provide a further sample of breath, and he did so. This also was positive. He was then required, under the Road Safety Act 1967, s 3, to provide a specimen of blood for a laboratory test, and this he did. No complaint was made that at any stage the defendant failed to do anything that was required of him in accordance with the Act of 1967. I do not think it affects the present problem, but it might be worth mentioning that it is tacitly conceded that this laboratory test, when subsequently made, showed that the proportion of alcohol in his blood was less than the prescribed limit, so that no offence under s 1 of the Road Safety Act 1967 was in fact committed by him. After the defendant had provided the specimen, he was released on his recognisance of £25 to appear at the South Shields Police Station at 11 a.m. on 4th May unless previously notified in writing that his attendance was not required. He signed that recognisance 'David Grey'.

Police-Sergeant Robinson, the officer in charge of the police station, has said in evidence that the defendant would not have been released if he had not signed that recognisance. P.s. Robinson was complying, I am told, with a Home Office instruction and was acting as he did in purported exercise of his powers under s 38 (2) of the Magistrates' Courts Act 1952, which provides:

'Where, on a person's being taken into custody for an offence without a warrant, it appears to [the police officer in charge of the police station to which the person is brought] that the inquiry into the case cannot be completed forthwith, he may release that person on his entering into a recognisance, with or without sureties, for a reasonable amount, conditioned for his appearance at such a police station and at such a time as is named in the recognisance unless he previously receives a notice in writing from the officer in charge of that police station that his attendance is not required; and any such recognisance may be enforced as if it were conditioned for the appearance of that person before a magistrates' court for the petty sessions area in which the police station named in the recognisance is situated.'

That section deals exactly with the situation where a person has been taken into custody for an offence without a warrant. There are two courses open to the officer at the police station under the section: (i) to release the person on his entering into a recognisance, (ii) to retain him in custody and bring him before a magistrate as soon as practicable. In addition, although not mentioned in the statute itself, it is well settled that, where it appears at the police station that in fact there is no ground to proceed further with the case, the person in custody should be released forthwith.

Section 1 of the Road Safety Act 1967 provides:

'(1) If a person drives or attempts to drive a motor vehicle on a road . . . having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provides a specimen under s 3 of this Act, exceeds the prescribed limit at the time he provides the specimen [he commits an offence].'

Section 2 (2) of the Act provides:

'If an accident occurs owing to the presence of a motor vehicle on a road . . . a constable in uniform may require any person who he has reasonable cause to believe was driving or attempting to drive the vehicle at the time of the accident to provide a specimen of breath for a breath test'

except that a person in hospital as a patient is not to be subjected to that test unless a medical practitioner in charge of his case makes no objection after being notified.

Section 2 (4) of the Act provides:

'If it appears to a constable in consequence of a breath test carried out by him under subs . . . (2) of this section . . . that the device by means of which the test is carried out indicates that the proportion of alcohol in that person's blood exceeds the prescribed limit, the constable may arrest that person without warrant except while that person is at a hospital as a patient.'

Section 3 (1) provides:

'A person who has been arrested under the last foregoing section . . . may, while at a police station, be required to provide a specimen for a laboratory test . . . if he has previously been given an opportunity to provide a specimen of breath for a breath test . . . and either—(a) it appears to a constable in consequence of the breath test that the device by means of which that test is carried out indicates that the proportion of alcohol exceeds the prescribed limit; or (b) when given the opportunity to provide that specimen [the person arrested] fails to do so.'

Section 4 of the Act provides:

'Any person required to provide a specimen for a laboratory test under s 3 (1) may thereafter be detained at the police station until he provides a specimen of breath for a breath test and it appears to a constable that the device by means of which the test is carried out indicates that the proportion of alcohol in that person's blood does not exceed the prescribed limit.'

The provisions of that section are clearly directed to ensure that a person who appears on a breath test to be likely to be unfit to control a motor vehicle is not released from the police station until such time has elapsed as ensures that he is fit to go home in charge of such a vehicle. It will be noticed that it is only a person who has been arrested, or who is in hospital, who may be required to provide a specimen.

Counsel for the defendant contends that so far as this statute is concerned—and no other statute is relied upon as relevant to the present case—while it authorises the arrest without a warrant in the specified circumstances, it does so only for the limited purpose of requiring the person arrested, while at the police station, to provide a specimen for a laboratory test; and, once he has done so, it does not authorise his further detention except as provided by s 4. He says that the defendant was not, therefore, a person 'taken into custody for an offence' within the contemplation of Magistrates' Courts Act 1952, s 38. He was only a person who, not being in hospital, was taken into custody for the limited purpose of taking a step to ascertain whether he had committed an offence or not. That contention may be correct, but, whether or not it is correct, I cannot see what right there was to require the defendant to enter into any recognisance at the police station as a condition of his release. There was no question of his being detained for a while under s 4. That course was never considered and never arose. If there is any right other than that given by s 4 to detain a person after he has done all that is asked of him, I cannot see why s 4 was enacted at all. It seems to me that at that stage, unless detained under s 4, he was entitled to go and to refuse to enter into any recognisance, and that this recognisance, requiring him under penalty to return to the police station at 11 a.m. on 4th May was imposing upon him an obligation for which there was no statutory authority.

I am not, therefore, prepared to hold that this was a recognisance within s 34 of the Forgery Act 1861, and I shall withdraw this case from the jury. To give a false name and address is, of course, an offence under Road Traffic Act 1960, s 228, which also

makes it an offence for a person to refuse to give his name and address when it is required. The defendant was not charged with either of those offences before me.

*Direction accordingly.*

Solicitors: C J Millar, Durham; Patterson Glenton & Stracey, South Shields.

J.M.C.

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**COURT OF APPEAL (CRIMINAL DIVISION)**

(SALMON AND PHILLIMORE, LJJ, AND NIELD, J)

12th June 1970

R v HARLING

*Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Specimen for laboratory test—Failure to supply—Reasonable excuse—Excuse relating to blood specimen only—Liability to supply specimen of urine—Direction to jury—Road Safety Act, 1967, s 3 (3) (6).*

By s 3 (6) of the Road Safety Act, 1967: 'A person shall not be treated for the purposes of sub-s (3) of this section as failing to provide a specimen unless—(a) he is first requested to provide a specimen of blood, but refuses to do so; (b) he is then requested to provide two specimens of urine within one hour of the request, but fails to provide them within the hour or refuses at any time within the hour to provide them; and (c) he is again requested to provide a specimen of blood but refuses to do so.

This subsection is not to be read as if in (a) the words 'without reasonable excuse' occurred before 'refuses'.

The fact that a defendant has a reasonable excuse for failure to supply a specimen of blood does not preclude the police from demanding a specimen of urine, and, if the defendant has no reasonable excuse for failure to provide a specimen of urine, he is liable to be convicted of an offence under s 3 (3) of failing to provide a specimen for a laboratory test.

A jury must consider in the light of all that happened at the police station when the procedure laid down by s 3 (6) was followed whether it has been proved beyond reasonable doubt that there was no reasonable excuse for the failure of the defendant to provide any specimen either of blood or urine.

APPEAL by Frank Harling against his conviction at Lancashire Quarter Sessions of failing to provide a specimen of blood or urine for a laboratory test contrary to s 3 (3) of the Road Safety Act 1967.

T D T Hodson for the appellant

R J Hardy for the Crown.

**SALMON LJ** delivered this judgment of the court: On 3rd October 1969, at Lancashire quarter sessions the appellant was found guilty of failing to provide a specimen of blood or urine for a laboratory test, contrary to s 3 (3) of the Road Safety Act 1967. He was sentenced to a fine of £30 and he was disqualified for 12 months and an order was made for his licence to be endorsed. He now appeals against conviction by leave of the single judge.

The facts are very short. On 23rd May 1969, the appellant was driving his motor car near Blackburn in Lancashire when it behaved in a very curious way. It ran off the road, went across a verge, through a hedge and turned over, and three of its wheels came off. The appellant appeared to be very shaken, perhaps not unnaturally, and he went to a local farmhouse where a telephone call was put through to the



police. The police arrived and they suspected that the appellant had been drinking. He was, therefore, required to provide a specimen of breath for a breath test under s 2 (2) of the Act of 1967, and the test proved positive. He was arrested, and went to the police station. A constable in uniform then asked the appellant if he was prepared to give a specimen of his blood for a laboratory test. He said that he would be very happy to give a specimen of his blood, and a doctor was sent for. It is unnecessary to go into the details of what happened then, save to say that the doctor made three conspicuously unsuccessful attempts to take a specimen of blood. At the third attempt the appellant, who not unnaturally resented being used as a pin cushion and had by then lost all confidence in the doctor, said that enough was enough and that he was not prepared to allow that doctor to continue trying to take a blood specimen from him. The constable, while the doctor was still there, then asked the appellant if he would give a specimen of his urine and he refused. The reason which he gave for refusing was that he had thought that, once he had given a specimen of urine, that specimen would be tested by the doctor in whom he had lost all confidence. The appellant having refused the specimen of urine, the constable again asked the appellant for a specimen of his blood. Again the appellant thought that the specimen was going to be taken by the doctor who had performed so unsatisfactorily a short while before, and he refused.

Counsel for the appellant has very persuasively argued his client's case. He takes a short point under the Act. If this is a good point, it would mean, I suppose, that a fairly high percentage of persons who had been properly arrested and asked for specimens for laboratory tests would obdurately refuse to give them and triumphantly escape when they were subsequently prosecuted under the Act. The section which I must read is s 3, which provides:

'(1) A person who has been arrested under the last foregoing section . . . may, while at a police station, be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or of urine), if he has previously been given an opportunity to provide a specimen of breath for a breath test at that station under subsection (7) of the last foregoing section . . .'

'(3) A person who, without reasonable excuse, fails to provide a specimen for a laboratory test in pursuance of a requirement imposed under this section shall be guilty of an offence . . .'

So, under s 3 (1), an arrested man may be required to provide a specimen for a laboratory test. The specimen can be either of blood or of urine. Under s 3 (3), if without reasonable excuse he fails to provide a specimen for a laboratory test, then he is guilty of an offence, and that is the offence of which the appellant was convicted.

He certainly did not provide a specimen for a laboratory test as is plain from the facts that have already been stated. Counsel for the appellant relies on s 3 (6), which provides:

'A person shall not be treated for the purposes of . . . subsection (3) of this section as failing to provide a specimen unless—(a) he is first requested to provide a specimen of blood, but refuses to do so; (b) he is then requested to provide two specimens of urine within one hour of the request, but fails to provide them within the hour or refuses at any time within the hour to provide them; and (c) he is again requested to provide a specimen of blood but refuses to do so.'

The point taken by counsel for the appellant is that under s 3 (6) (a) one must read the words 'without reasonable excuse' into that paragraph before the word 'refuses'. According to counsel for the appellant's construction, s 3 (6) (a) would read: 'A person shall not be treated for the purposes of . . . subsection (3) . . . as failing to provide a



specimen unless—(a) he is first requested to provide a specimen of blood, but without reasonable excuse refuses to do so.' He says that if a defendant refuses with a reasonable excuse, then that is the end of the matter and he can in no circumstances be convicted of failing to provide a specimen under s 3 (3).

The courts do not readily read into an Act words that are not there. It is sometimes, although very rarely, necessary to do so in order to make sense of what would otherwise be nonsense, but we certainly do not do so for the purposes of making nonsense of the Act. It would indeed make nonsense of the Act to read the words 'without reasonable excuse' into sub-s (6). Supposing, for example, a haemophiliac was asked to give a blood sample but refused; that obviously would be a very reasonable thing for him to do. The constable might then say to him: 'Please give me a sample of urine' and very unreasonably he would reply to that: 'No, I won't.' Then he is prosecuted under s 3 (3) and he says: 'You cannot prosecute me under s 3 (3) because you have not satisfied the condition under s 3 (6) of proving that I refused without a reasonable excuse to give you a blood sample'. This court does not consider that a construction leading to such absurd results can properly be put on s 3 (6). That subsection in its ordinary and natural meaning makes perfectly good sense. The constable has to ask the motorist for a specimen of his blood. If the motorist refuses to give a specimen of his blood, s 3 (6) (a) is satisfied. Then, if the motorist has refused to give a specimen of his blood, the constable must ask him to provide two specimens of urine under s 3 (6) (b). If the motorist fails or refuses to supply samples of his urine in accordance with para (b), the constable must under para (c) again ask him to provide a specimen of blood. If the motorist refuses, the requirements of s 3 (6) are satisfied. In these circumstances there is no specimen of any kind either of blood or urine. It is then necessary to go back to s 3 (3) and consider whether or not there is any reasonable excuse for the motorist failing to provide a specimen for a laboratory test. This is a question for the jury to consider in the light of what happened when the constable went through the ritual provided by sub-s (6). The jury must consider the question, on the whole of the evidence, whether it has been proved beyond a reasonable doubt that there was no reasonable excuse for the failure by the motorist to provide any specimen either of blood or urine. If they answer that question against the motorist, he is guilty of an offence under s 3 (3).

In the present case the summing-up, in the view of this court, was completely accurate. The chairman told the jury quite plainly what they should consider. The appellant in the first instance said that he would give a blood sample. There had been the attempts to which I have referred to take a sample. He had then refused to allow the doctor to go on with those attempts. The chairman said: 'Was that a reasonable refusal?', and he gave the jury a fairly clear indication what his views were, namely, that it would be harsh to describe the appellant's conduct as being unreasonable, having regard to what the doctor did or failed to do. He then left the question to the jury: 'Was it reasonable for the appellant to refuse to give specimens of his urine?' He explained to the jury that the reason given by the appellant was that he thought that it was this doctor, who appeared to be incompetent, who would test the urine, but, of course, the jury were not obliged to accept that evidence from the appellant. Indeed, they would be entitled to come to the conclusion that his explanation why he refused to give a specimen of his urine was complete moonshine, and, if they disbelieved his explanation, there was plenty of evidence on which they could come to the conclusion that his refusal was unreasonable. In such circumstances they could and indeed should come to the conclusion that he failed to provide a specimen for a laboratory test without reasonable excuse.

In the view of this court, that was a perfectly accurate summing-up. There was plenty of evidence on which the jury could and obviously did come to the conclusion

that they had been satisfied beyond a reasonable doubt that the appellant in failing to supply a specimen of his urine had without reasonable excuse failed to provide a specimen for a laboratory test and had, therefore, committed an offence under s 3 (3). For these reasons, the appeal against conviction fails and will be dismissed.

*Appeal dismissed.*

Solicitors: *Farley, Parker & Pickles*, Blackburn; *R H G Horne, Graham & Co*, Blackburn.

T.R.F.B.

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COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW, LJ, JAMES AND O'CONNOR, JJ)

16th September 1970

R v PINK

*Criminal Law—Appeal—Application of proviso to s 2 (1) of the Criminal Appeal Act, 1968.*

Where an irregularity had occurred by reason of a second speech for the prosecution having been made on the trial of an unrepresented defendant who had given no evidence or had called no witness other than himself,

HELD: there was no rule of law or practice that the proviso to s 2 (1) of the Criminal Appeal Act, 1968, might be applied only in exceptional circumstances. The test with regard to its application was whether the court considered that, if the irregularity had not occurred, a reasonable jury would necessarily and inevitably have brought in a verdict of guilty.

APPEAL by Ronald Pink against his conviction at Leeds Assizes of living wholly or in part on the earnings of prostitution, when he was sentenced to four years' imprisonment.

*J R Playford* for the appellant.

*B Walsh* for the Crown.

MEGAW LJ delivered this judgment of the court: The appellant Ronald Pink was convicted at Leeds Assizes on 7th May 1969 of living wholly or in part on the earnings of the prostitution of a woman named Margaret Wilson. He was sentenced to four years' imprisonment. He applied for leave to appeal against conviction. In October 1969, the single judge granted him leave to appeal against conviction. The ground on which the single judge granted leave was this. At the trial at Leeds Assizes the appellant was offered legal aid and refused it and conducted his own defence. He did not give evidence or make an unsworn statement from the dock, nor did he call any witnesses. The learned judge invited counsel for the prosecution to address the jury for a second time after the appellant had stated that he would not give evidence. Counsel for the prosecution accepted that invitation and addressed the jury. The single judge took the view that that was wrong. He granted legal aid subject to a statement of means which was supplied by the appellant in December 1969. It is apparent that an irregularity occurred, and counsel appearing for the prosecution in this appeal does not seek to contend the contrary.

The position, which arises out of practice stemming from s 2 of the Criminal Procedure Act 1865, is correctly set out in Archbold, Criminal Pleading Evidence & Practice, 37th edn, 1969, para 559:

'Where an accused who is unrepresented gives evidence himself but calls no other witnesses, counsel for the prosecution is not allowed to address the jury a second time...'

and the same applies where an accused who is unrepresented not only does not call any other witnesses but does not give evidence himself.

This court agrees with the single judge. There was thus at the least an irregularity at the trial. The appeal came before this court differently constituted on 5th March 1970. The appellant was represented by counsel, who has appeared on behalf of the appellant today. The court was then told that the appellant had recently disclosed to counsel that he had received information which led him to believe that a member of the jury at the trial was personally known to Miss Wilson. It was desired to adduce evidence to that effect. Accordingly, an adjournment was asked for on behalf of the appellant and this was granted. The appellant was required to furnish the court with a statement of the proposed new evidence at the earliest possible moment. To that end the appellant was granted the legal aid of solicitors as well as of counsel. This court has been informed by counsel for the appellant that, the matter having been investigated, it is not thought right to pursue it further. In those circumstances this court says no more about that matter.

The facts of the case can be fairly briefly summarised. Miss Wilson gave evidence that she first met the appellant in June 1968. She was then aged 18 and a prostitute. Between then and 2nd August 1968 she used to stay with him three or four times a week, and on one occasion she went with him to Glasgow and spent some time with him there. She gave the appellant, she said, the money which she earned from prostitution. At the time of the trial Miss Wilson was in Borstal for an offence of theft. A number of other prostitutes were called at the trial, at least one of them to give evidence of seeing Miss Wilson with the appellant during this period, but also in order that they might establish a system to rebut the anticipated defence of innocent association between the appellant and Miss Wilson. None of these prostitutes gave evidence that Miss Wilson actually gave the appellant money. A police officer gave evidence of arresting Miss Wilson for loitering for prostitution on 1st August 1968. He said that, when she was granted bail that evening, he, the police constable, thereafter saw her approaching and speaking to the appellant. She then resumed her loitering for prostitution and was once again arrested the same night.

The appellant was not arrested until 21st January 1969. He was then in Carlisle. According to the police, he told a number of lies, including denying his identity, denying that he had any girl friends, denying that he had ever lived in Leeds, denying that he knew Miss Wilson and denying that he possessed a car. Some of these lies were immediately detected by reason of documents found on him. There was found on him a photograph showing two of the prostitutes, witnesses who gave evidence at the trial, naked in bed. That photograph was put in evidence at the trial.

Counsel for the appellant has said clearly and well everything that can be said in support of this appeal against conviction. His point is, of course, the irregularity of the second speech by counsel for the prosecution when the appellant was not calling witnesses and the appellant was not represented by counsel. The real issue is whether or not in this case, having regard to that irregularity, the court can, and should, apply the proviso contained in s 2 (1) of the Criminal Appeal Act 1968. The terms of that proviso are as follows:

'Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.'

Counsel referred us to *R v Mondon* (1) decided in 1968 by this court. The facts in that case were that the appellant, Mrs Mondon, was accused of shoplifting. She dismissed her counsel and solicitor and conducted her own defence. She was convicted. The essence of the issue which arose at the trial was that she said, and witnesses for the prosecution denied, that she had given a 10s note to an assistant in the shop in rather unusual circumstances before she left the shop. If the 10s had been given to the assistant, then plainly there was no offence, no dishonesty of any sort. If it had not been given, then it would be difficult to see how the appellant was not guilty. In that case by the same irregularity as has occurred here, after the appellant gave her evidence but called no other witnesses, she being unrepresented, the prosecution made a second speech summing up the evidence to the jury. The court in *R v Mondon* referred to the earlier authorities on this point, first, *R v Harrison* (2) where SALTER J, delivering the judgment of the court, made it clear that it was permissible to apply the proviso. There was no rule of law that the proviso may not be applied when this irregularity occurs, and, in fact, in that particular case the proviso was applied. But he made this observation:

'it might be that in another case this court would have to hold that a conviction, in a trial where such an irregularity occurred, must be quashed.'

It may be mentioned also that in *R v Thomas* (3), decided a few months earlier, the Court of Criminal Appeal had applied the proviso in such a case. The next case referred to in *R v Mondon* (1) was *R v Baggott* (4) where LORD HEWART CJ, delivering the judgment of the Court of Criminal Appeal, had referred to *R v Harrison* (2), and had said among other things:

'Since that time there have been occasions, including one comparatively recent occasion, where a conviction was quashed upon that ground. That episode in itself is sufficient to conclude the matter.'

It may well be that there is an ambiguity about the words 'that episode', because there were some very remarkable features of that case, including the fact that counsel in his irregular second address to the jury had made an erroneous proposition of law which had not been corrected in the subsequent direction to the jury.

The court in *R v Mondon* (1) expressed their final conclusion on the matter in these words:

'We cannot say in a case of this kind, which turned solely upon issues of facts, that the concluding speech of Crown counsel may not have had a powerful effect upon the jury and influenced their verdict. In those circumstances, we do not think that the irregularity which occurred can be cured by the application of the proviso, and accordingly this appeal must be allowed and the conviction quashed.'

Counsel for the appellant says that that case, properly interpreted, lays down a rule of practice that the proviso is not to be applied in such a case, at any rate unless there are some quite exceptional circumstances which he says do not exist in the present case. In the view of this court, *R v Mondon* (1) is a case in which materially different features are to be found. In that case, even though the court took the view that many people might think that the guilt of the appellant was clear, there was a direct conflict of evidence between the prosecution and the defence on a vital

(1) (1968), 52 Cr App Rep 695.

(2) (1923), 17 Cr App Rep 156.

(3) (1922), 17 Cr App Rep 34.

(4) (1927), 20 Cr App Rep 92.

issue. Here there was no real challenge to the evidence of the prosecution, which showed that the appellant had been habitually in the company of a prostitute, Miss Wilson. The appellant did not admit it, but there was no real or substantial challenge. Therefore, it was an issue for the jury, as the judge fairly and clearly pointed out, because it was for the prosecution to prove the fact that the appellant had been habitually in the company of the prostitute in question during the relevant period. But if the jury accepted the unchallenged evidence of habitual association, then, by reason of s 30 (2) of the Sexual Offences Act 1956, the burden of proof shifted to the appellant and the appellant had given no evidence.

In the view of this court, *R v Mondon* (1) did not lay down any rule of practice in relation to the application of the proviso in such a case. The test is the test which is described in the proviso itself in the words which I have already read: '... the court may ... dismiss the appeal if they consider that no miscarriage of justice has actually occurred'. The test is this: If the irregularity had not occurred, if no second speech had been made in this case on behalf of the prosecution, would a reasonable jury necessarily and inevitably have brought in a verdict of guilty?

Counsel for the appellant supports his submission that the proviso should not be applied in this case by reference to three matters. First, he says that there was a failure by the learned judge to inform the appellant at the end of the prosecution evidence of the appellant's right to call witnesses on his behalf. In the literal sense that was so. The learned judge took great care to inform the appellant of his right to give evidence. He did not expressly add 'or to call witnesses'. But the question arose and the learned judge realised that there was the possibility that there might have been some misunderstanding in that matter while the appellant was making his address to the jury, and he then clearly and specifically invited the appellant, if he so wished, to ask that witnesses should be called. The appellant rejected that request saying that it was too late although he was assured by the judge that it was not. There is nothing whatever in that point.

Next, says counsel for the appellant, the learned judge made two mistakes of fact in the summing-up. The first mistake of fact is that the learned judge told the jury that a police constable, Pc Crosby, had said that, on the occasion of 1st August 1968, when he had arrested Miss Wilson as being a prostitute and then released her on bail, he saw Miss Wilson approaching the appellant who was then in a motor car. That, counsel says, on the basis of a transcript (and, of course, we accept the accuracy of what he tells us) was not what Pc Crosby said. He did not say that he saw Miss Wilson go to see the appellant in a motor car. Pc Crosby said that she went to see him and spoke to him outside a club. There is nothing whatever in that error which can conceivably affect the determination of this appeal. The second error of fact was, if anything, even less relevant and even more trivial. The learned judge, referring to the evidence of Miss Wilson, said that she had given evidence that the appellant had stayed with her three or four times a week and that it was at her mother's. In fact, according to the transcript, it was not at her mother's, at least on most occasions.

Lastly in support of the proposition that the proviso should not be applied, counsel refers to and complains of the admission of evidence of the photograph to which reference has been made which was found on the appellant when he was arrested at Carlisle showing two of the prostitutes who were witnesses naked in bed. It is said by counsel that the judge in his discretion, particularly when the appellant was unrepresented by counsel, ought not to have allowed that photograph to be admitted in evidence because it was irrelevant to any issue and might be prejudicial. In the view of this court, there is again no substance in that objection. It is to be

noted that according to the evidence of the police constable who arrested the appellant at Carlisle that one of the questions that the constable asked him was: 'Do you know Margaret Wilson and that she is a prostitute?' The answer to that was 'I don't have any girl friends', and the learned judge properly put to the jury: 'Is that a lie?' That was one of the matters which the learned judge properly left to the jury as being possible corroboration, if it was a lie. In those circumstances it cannot properly be said that the photograph was not admissible in evidence. There being nothing then in any of these matters, there was a fair and accurate direction to the jury both on law and on fact.

In the view of this court, on the material before them, no reasonable jury, unaided by a second address on behalf of the prosecution but with the benefit of a full and fair summing-up such as they had in this case, would have failed to bring in a verdict of guilty. Accordingly, this appeal is dismissed.

*Appeal dismissed.*

Solicitors: J H Milner & Son, Leeds; Sharpe, Pritchard & Co, for T B Atkinson, Leeds.

T.R.F.B.

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COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY, LJ, CANTLEY AND WALLER, JJ)

29th September 1970

R v JONES

*Road Traffic—Driving while disqualified—Outstanding offences taken into consideration—Similar offence.*

When sentencing a defendant for the offence of driving a motor vehicle while disqualified, the court may properly take into consideration another offence of a similar kind, e.g., another offence of driving while disqualified, but where the principal offence is of a completely different kind it would not be proper for a court to take into consideration an offence which may involve disqualification.

APPLICATION by Robert Thomas Jones for leave to appeal against sentence passed on him at Lancashire Quarter Sessions when he had pleaded guilty to driving a motor vehicle while disqualified.

No counsel appeared.

**WALLER J** delivered this judgment of the court: On 14th May 1970, at Lancashire Quarter Sessions, the applicant pleaded guilty to driving while disqualified and was sentenced to nine months' imprisonment. His licence was endorsed and he was disqualified for driving for 18 months consecutive to the total period of disqualification to which he was then subject. He was further disqualified for six months under the totting-up provision, such disqualification to be concurrent. His application has been referred to the full court because of a technical matter of the propriety of the concurrent disqualification for totting-up. It appears also that the court itself was concerned whether or not it was right to take into account, as was done, one other offence of driving while disqualified.

I must first consider whether it was in order to take that other offence into account?



In *R v Collins* (1) this point arose for consideration and it was then made clear that it would not be right to take into account an offence for which there could be disqualification, such as taking and driving away, or driving while disqualified, when the principal offence was one of a completely different kind. But LORD GODDARD CJ added:

'No doubt, if a man is charged on indictment with an offence under the Road Traffic Acts for which he is liable to be disqualified, and there is a second charge against him for the same class of offence, the court might take that into account.'

That is precisely what was done in this case. The principal offence was one of driving while disqualified and the offence taken into consideration was another offence of driving while disqualified, so that when a period of disqualification was being imposed for the principal offence the other offence could be taken into consideration. So it was, in the view of this court, perfectly proper for the deputy chairman to allow that other offence to be taken into consideration, it being a similar kind of offence.

The second point that arises is the form of the order of disqualification. The deputy chairman disqualified for 18 months and made the compulsory totting-up disqualification run concurrently. Unfortunately, that is not correct because the Road Traffic Act 1962, s 5 (5), provides that the period of any such disqualification shall be in addition to any other period of disqualification imposed. It was no doubt a slip of the tongue on the part of the deputy chairman who probably had in mind the note in 2 Stone's Justices' Manual (1970 edn.) p. 3115, note (k) (ii) in dealing with that subsection. This court will modify the order by making the disqualification 12 months consecutive to the total period of disqualification and the totting-up disqualification an additional six months, making 18 months in all and leaving the disqualification unaffected in total. Leave to appeal will be granted, this will be treated as the appeal and to that extent the appeal will be allowed. The effect of what this court is doing is simply a technical readjustment. The applicant is left with precisely the same disqualification as before. Apart from that, the appeal is dismissed.

*Sentence varied.*

T.R.F.B.

(1) 111 JP 154; [1947] 1 All ER 147; [1947] KB 560.



QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, ASHWORTH AND BROWNE, JJ)

20th October 1970

R v BRIXTON PRISON GOVERNOR. Ex parte KEANE

*Magistrates—Irish warrant—Endorsement—No inquiry whether prima facie case made out—Habeas corpus—Likelihood of prosecution or detention for political offence—Backing of Warrants (Republic of Ireland) Act 1965, s 1 (2) (b).*

Soon after the arrival of the applicant in England from Ireland, he was arrested on two Republic of Ireland warrants on charges of murder and armed robbery, which warrants had been endorsed by a metropolitan magistrate in accordance with the Backing of Warrants (Republic of Ireland) Act, 1965. Before the magistrate the applicant gave evidence and called witnesses to show that he had at one time been a member of the IRA and was now an active member of a new political organisation called Free Ireland, which had attracted considerable and persistent interest from the Irish police and the Irish government, and which, though not illegal, could be made illegal at any moment, and, if it were made illegal, he might be detained and prosecuted for offences of a political character. The magistrate, without having enquired whether a *prima facie* case had been shown against the applicant in respect of either offence charged, ordered his return to the Republic of Ireland. On an application for habeas corpus on the ground that no order for his return could be made by reason of s 2 (2) (b) of the Act of 1965 inasmuch as he had shown by his evidence that there were substantial grounds for believing that, if taken to the Republic of Ireland, he would be prosecuted or detained for an offence of a political character,

**HELD:** (i) that 2 (2) (b) of the Act of 1965 would act as a bar to the making of an order for the applicant's return only if it were shown that on his return he was going to be prosecuted, not for the offences charged, but for some other offence or offences of a political character, and this had not been established; (ii) alternatively, giving s 2 (2) (b) its widest possible construction, the applicant could succeed only if he could point to some definite political offence with which he was going to be charged or detained, and the applicant had failed to do this: the motion for habeas corpus must, therefore, fail.

**MOTION** for habeas corpus on behalf of Patrick Francis Keane, detained in Brixton prison, which are summarised in the headnote.

*J P Comyn QC and I Brownlie for the applicant.*

*K A Richardson for the governor of Brixton prison and the government of the Republic of Ireland.*

**LORD PARKER CJ:** In these proceedings counsel moves on behalf of one Patrick Francis Keane, at present detained in Her Majesty's prison at Brixton, pursuant to two warrants issued by the Republic of Ireland, and backed by a metropolitan stipendiary magistrate. The application is an application for a writ of habeas corpus that he be discharged and not sent back to Ireland.

The matter arises in this way. On 2nd May 1970, the applicant arrived from the Republic of Ireland in this country. On 13th May, he was arrested on two Irish warrants endorsed by the magistrate, the first being for the murder on 3rd April of a policeman, Carda Fallon, in connection with a bank robbery. The second was a charge of armed robbery of a bank on another occasion, namely on 20th February. The matter was heard by the magistrate at Old Street on a number of days, but finally on 14th August 1970 the magistrate ordered the applicant's return to the Republic of Ireland.

Before going on to the points in issue in this case it is, I think, convenient to look

quite shortly at the scheme of the legislation which is quite different in the case of the Republic of Ireland from what is provided for in the Extradition Acts 1870 to 1932 and in the Fugitive Offenders Act 1967. By s 1 (1) of the Backing of Warrants (Republic of Ireland) Act 1965, it is provided:

'Where—

'(a) a warrant has been issued by a judicial authority in the Republic of Ireland (in this Act referred to as the republic) for the arrest of a person accused or convicted of an offence against the laws of the republic, being an indictable offence or an offence punishable on summary conviction with imprisonment for six months; and

'(b) an application for the endorsement of the warrant is made to a justice of the peace in the United Kingdom by a constable who produces the warrant and states on oath that he has reason to believe the person named or described therein to be within the area for which the justice acts;

'then, subject to the provisions of this section, the justice shall endorse the warrant in the prescribed form for execution within the part of the United Kingdom comprising the area for which he acts.'

Subject, therefore, to the provisions of the rest of the section, to which it is unnecessary to refer, the magistrate is there performing a ministerial act of endorsing a warrant issued by the Republic of Ireland on production of that warrant, that endorsement being the authority to an English constable to arrest the man charged.

The next step is dealt with in s 2, which provides:

'(1) So soon as is practicable after a person is arrested under a warrant endorsed in accordance with section 1 of this Act, he shall be brought before a magistrates' court and the court shall, subject to the following provisions of this section, order him to be delivered at some convenient point of departure from the United Kingdom into the custody of a member of the police force . . . of the republic, and remand him until so delivered.

'(2) An order shall not be made under subsection (1) of this section if it appears to the court that the offence specified in the warrant does not correspond with any offence under the law of the part of the United Kingdom in which the court acts which is an indictable offence or is punishable on summary conviction with imprisonment for six months; nor shall such an order be made if it is shown to the satisfaction of the court—(a) that the offence specified in the warrant is an offence of a political character, or an offence under military law which is not also an offence under the general criminal law, or an offence under an enactment relating to taxes, duties or exchange control; or (b) that there are substantial grounds for believing that the person named or described in the warrant will, if taken to the republic, be prosecuted or detained for another offence, being an offence of a political character or an offence under military law which is not also an offence under the general criminal law.'

There are not in this case any notes of reasons given by the magistrate; a comment has been made in regard to that, but for my part I find no difficulty arising from the fact that there is an absence of reasons shown. The first point which counsel for the applicant takes here was that there was no inquiry by the magistrate whether, to put it quite shortly, a *prima facie* case had been shown that the applicant was guilty of the two offences charged, and reference has been made by counsel in particular to para 3 of the schedule to the Act. It deals with supplementary provisions as to proceedings under s 2. Paragraph 3 provides:

QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, ASHWORTH AND BROWNE, JJ)

20th October 1970

R v BRIXTON PRISON GOVERNOR. Ex parte KEANE

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Soon after the arrival of the applicant in England from Ireland, he was arrested on two Republic of Ireland warrants on charges of murder and armed robbery, which warrants had been endorsed by a metropolitan magistrate in accordance with the Backing of Warrants (Republic of Ireland) Act, 1965. Before the magistrate the applicant gave evidence and called witnesses to show that he had at one time been a member of the IRA and was now an active member of a new political organisation called Free Ireland, which had attracted considerable and persistent interest from the Irish police and the Irish government, and which, though not illegal, could be made illegal at any moment, and, if it were made illegal, he might be detained and prosecuted for offences of a political character. The magistrate, without having enquired whether a prima facie case had been shown against the applicant in respect of either offence charged, ordered his return to the Republic of Ireland. On an application for habeas corpus on the ground that no order for his return could be made by reason of s 2 (2) (b) of the Act of 1965 inasmuch as he had shown by his evidence that there were substantial grounds for believing that, if taken to the Republic of Ireland, he would be prosecuted or detained for an offence of a political character,

HELD: (i) that 2 (2) (b) of the Act of 1965 would act as a bar to the making of an order for the applicant's return only if it were shown that on his return he was going to be prosecuted, not for the offences charged, but for some other offence or offences of a political character, and this had not been established; (ii) alternatively, giving s 2 (2) (b) its widest possible construction, the applicant could succeed only if he could point to some definite political offence with which he was going to be charged or detained, and the applicant had failed to do this: the motion for habeas corpus must, therefore, fail.

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'then, subject to the provisions of this section, the justice shall endorse the warrant in the prescribed form for execution within the part of the United Kingdom comprising the area for which he acts.'

Subject, therefore, to the provisions of the rest of the section, to which it is unnecessary to refer, the magistrate is there performing a ministerial act of endorsing a warrant issued by the Republic of Ireland on production of that warrant, that endorsement being the authority to an English constable to arrest the man charged.

The next step is dealt with in s 2, which provides:

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There are not in this case any notes of reasons given by the magistrate; a comment has been made in regard to that, but for my part I find no difficulty arising from the fact that there is an absence of reasons shown. The first point which counsel for the applicant takes here was that there was no inquiry by the magistrate whether, to put it quite shortly, a *prima facie* case had been shown that the applicant was guilty of the two offences charged, and reference has been made by counsel in particular to para 3 of the schedule to the Act. It deals with supplementary provisions as to proceedings under s 2. Paragraph 3 provides:

'Subject to paragraph 2 of this schedule, the court shall have the like powers, including power to adjourn the case and meanwhile to remand the person arrested under the warrant either in custody or on bail, and the proceedings shall be conducted as nearly as may be in the like manner, as if the court were acting as examining justices inquiring into an indictable offence alleged to have been committed by that person.'

There was no inquiry here whether a *prima facie* case had been shown.

Counsel for the applicant quite properly recognises the fact that that point is not open to him in this court, and he merely reserves it, and for this reason, that the court rightly or wrongly, in *Re Arkins* (1), decided that in this legislation no provision whatever had been made for an inquiry of the nature which is made by a magistrate under the Extradition Acts 1870 to 1932 and the Fugitive Offenders Act 1967 into the question whether a *prima facie* case has been made out. That case has been followed more recently by the court in an unreported case of *Re Dwyer* (2). It does not appear in the report of *Re Arkins* or in the transcript of the judgment in *Re Dwyer* whether the court was specifically referred to para 3 of the schedule, but for my part I am quite satisfied that those cases were rightly decided and that we must follow them, and that there is ample scope for the operation of para 3 of the schedule in regard to matters that admittedly have to be inquired into under s 2 (2) of this Act.

The second point concerns the matter set out in s 2 (2), on proof of which no order to go shall be made. I have already read the subsection and I would emphasise that counsel for the applicant, quite rightly in my judgment, does not rely on para (a). He does not suggest, and could not well suggest, that the killing of a policeman in the course of a bank raid or the armed robbery of a bank were offences of a political character, or that they were offences under military law which was not also an offence under the general criminal law, nor that they were offences under an enactment relating to taxes, duties, or exchange control. What he does say, however, is that he can rely on para (b) and he says that he showed by evidence given before the magistrate that there were substantial grounds for believing that the person named or described in the warrant, namely, the applicant, would, if taken to the Republic of Ireland, be prosecuted or detained for another offence being an offence of a political character or an offence under military law which was not also an offence under the general criminal law.

Before the magistrate the applicant himself gave evidence, and he called a number of witnesses. Although in his deposition he did not specifically say that he had believed that he was going to be charged with another offence, it is really implicit in the nature of the evidence he gave. I find it unnecessary to go through it because in this court he has put in a further affidavit which embroiders to some extent the evidence which he gave below, and which he is, in my judgment, entitled to adduce on a habeas corpus application in this court. I do not propose to go through it in any detail, but what he in fact says quite shortly is that he is a man who all his life has conducted considerable political activities and at one time was a member of the Irish Republican Army. More recently he has organised or been the leading member in a new political organisation called Free Ireland, which, he says, has attracted considerable and persistent interest and attention from the Irish police and the Irish government. He goes on to say that, although that organisation is not illegal, it could be made illegal at any moment by the introduction of the Offences Against the State Act 1939. If it were in the future made illegal, then he, as a leading member

(1) 130 JP 427; [1966] 3 All ER 651.

(2) (13th April 1970) unreported.

of it, if he persisted in his political activities (and as counsel for the applicant put it, he is a political animal who will go on doing this), might be detained and indeed prosecuted under those Acts, and the offences alleged would undoubtedly then be of a political character. That is the first way in which he puts it.

The second is to say: I have served a sentence of imprisonment for attempted arson, carrying firearms, and common assault in October 1967 which arose out of an attack on the headquarters of the Fianna Fail, the government party office, presumably a political offence, showing that he is, as he undoubtedly is, a political animal. He refers also to the fact that on a number of occasions he has been detained for a matter of a day or two days and, that he has always got the police, as it were, on his tail watching what he is doing. He refers in particular to an armed robbery on a bank in Newbridge in respect of which he was arrested and detained for some nine weeks before he was granted bail, and that when it came to trial some time later the prosecution entered a *nolle prosequi*. In other words he is really saying: 'I am a political animal, I am watched very closely, and if I carry on my political activities, as I am going to, I may from time to time be detained'.

Counsel for the applicant urges that that is enough, if believed, to satisfy any court, either the magistrate or this court, that there are substantial grounds for believing that, as the paragraph says, if returned he will 'be prosecuted or detained for another offence, being an offence of a political character'. As I have said, the magistrate gave no reasons, but for my part I am perfectly prepared to accept that he, like myself, had no reason to disbelieve the evidence given by the applicant. The question as I see it is, accepting all that the applicant has said, is it a case where any reasonable court must come to the conclusion that there are substantial grounds for believing that he will be prosecuted for a political offence?

That brings me to the construction of s 2 (2) (b). It is urged that the widest possible construction should be given to the words, and that even if the arrested person was going to be prosecuted for the murder and the armed robbery, yet if there were substantial grounds for believing that thereafter at some time in the future undefined, he was going to be prosecuted for a political offence, then he cannot be returned. The rival construction is the narrow one that this paragraph only acts as a bar to the making of an order for his return if it is shown that he is not going to be prosecuted for the offences charged, but for another offence or offences. For my part, I am satisfied that the narrower construction here is the right one. If one reads the whole of the subsection, and reads paras (a) and (b) together it becomes, in my judgment, perfectly plain that no order shall be made (a) if the offence charged is itself of a political nature, or (b) if even though it is worded so as not to be political, yet when the arrested person gets to Ireland he is not going to be prosecuted for that offence, but for a political offence. This is a pure matter of construction, but it seems to me here that the words 'another offence' really mean another offence in substitution for that charge, and not, as counsel for the applicant would say, an additional offence at some time in the future. It is to be observed for what it is worth, although I find little help can be really derived from it, that the construction which I prefer coincides with the provision in the Extradition Act 1870 which is to be found in s 3 (1). I say that I get very little help from that because it is perfectly obvious that the scheme of the Backing of Warrants (Republic of Ireland) Act 1965 differs so much from the scheme of the Extradition Acts 1870 to 1932 and the Fugitive Offenders Act 1967 that little help can be got by a comparison.

If the construction which I prefer is right, then I think that counsel for the applicant would be bound to concede that he must fail because there is no suggestion here that the applicant is not going to be prosecuted on the charges in the warrant. What is feared is that thereafter he may be held or prosecuted for some political



offence. Even if I am wrong, I am by no means satisfied that the applicant has brought himself within the exception in para (b). It seems to me that even on the wider construction he must point to some offence for which he is going to be detained or charged—in other words something which has happened already in which it is alleged that he is concerned and which is of a political character, and he fears that whether in substitution or in addition he is going to be prosecuted for that. A typical case, as it seems to me, would be if in fact Free Ireland had been made an illegal organisation under the Offences Against the State Act 1939, and that before he came to this country in May, he had taken some active step as a leading member of that organisation. Then he might well say that he genuinely feared and had real ground for fearing that, if he went back, he would be charged for that political offence. As I said, the applicant gets nowhere near that in this case. He merely says that at some time in the future, he does not know when, this organisation may be declared to be illegal, and then, if he carries on his activities, he may be charged for a political offence.

In my judgment, on either construction the applicant has not brought himself in s 2 (2) (b), and I am quite clear that there are no substantial grounds for believing that he will be prosecuted or detained, if returned, for a political offence. Accordingly, in my judgment this motion fails.

**ASHWORTH J:** I agree.

**BROWNE J:** I agree.

*Application dismissed.*

Solicitors: B M Birnberg & Co; Director of Public Prosecutions.

T.R.F.B.

### COURT OF APPEAL (CIVIL DIVISION)

(RUSSELL, SACHS AND CROSS, LJJ)

23rd, 24th March, 7th April, 13th May 1970

Re W (an infant)

*Adoption—Consent—Dispensing with consent—Unreasonable withholding of consent—Unreasonableness—Adoption Act, 1958, s 5 (1) (b).*

After having two daughters by one man and a son by another man, an unmarried mother, who was living with her two children by the first man and a female cousin, withheld her consent to the adoption of her son, although she had decided before he was born to have the child adopted. He was born on 28th March 1968. On 5th April 1968 the mother parted with him, and he was sent to temporary foster parents. The mother never saw him again because in July 1968 she accepted the advice of a child care officer that she should not do so unless she decided definitely to look after him permanently. The foster parents, who had been married about ten years, adopted a baby girl on 28th March 1968, and in June 1969 had a child of their own. They had looked after the foster child successfully, become very attached to him, asked to adopt him in September 1968, and commenced adoption proceedings in January 1969. After some hesitation the mother signed a form of consent in February 1969, but on 30th March 1969 withdrew her consent, saying she wanted the child back permanently. The case was to be heard on 1st April 1969, but the judge adjourned it for the parties to be legally represented. The welfare officer considered that the mother could offer the child a good home and be a good

mother and that her motives were genuine, but that the foster parents could offer an excellent home with a great deal of love and understanding and greater stability and security, and that the child was likely to suffer great emotional disturbance if he went back to the mother. No medical evidence was given as to any possible injury to the child's health if the order for adoption were not made. On appeal against the decision of the trial judge that an adoption order would be best for the welfare of the child, that the mother was withholding the consent unreasonably within the meaning of s 5 (1) (b) of the Adoption Act, 1968, and that her consent should be dispensed with and an adoption order made.

HELD: (i) the child's welfare could only be relevant where there was a clear prognosis of relative harm to the child if the adoption order were not made, enabling the judge to say that no mother acting reasonably could withhold consent to the adoption; accordingly the judge had applied the wrong test in considering the child's welfare, and the Court of Appeal had itself to decide whether the refusal of consent was unreasonable; (ii) although the circumstances were such that the mother could reasonably have consented to the adoption, the court was not satisfied that she acting unreasonably in withholding her consent.

*Adoption—Practice—Application to dispense with parent's consent—Particulars of grounds for application to be furnished.*

Applicants for adoption who ask the court to dispense with the consent of a parent on the ground that that consent is being unreasonably withheld should before trial furnish the court and the parent in question with particulars of the matters on which they rely as showing that the parent is acting unreasonably.

APPEAL from Shoreditch County Court.

I H M Jones QC and A M Hill for the mother.

A R Campbell QC and Anita Ryan for the applicants.

*Cur adv vult*

13th May. The following judgments were read.

**RUSSELL LJ:** This appeal concerns an order for the adoption of a small child—the son of an unmarried mother—against the wishes of the mother, who indeed wishes to bring the child up herself. When it is appreciated that the effect of an adoption order is permanently to sever the relationship between mother and child it may well be thought that very special circumstances must exist to justify a compulsory and total destruction of that relationship despite her opposition. Section 13 of the Adoption Act 1958 describes the effect of an adoption order as the extinguishment of all rights, duties, obligations and liabilities of the parent in relation to the custody, maintenance and education of the infant, and their transfer to the adopters, whose child the infant becomes.

Section 4 of the Act (so far as now material) lays it down that no adoption order can be made without the consent of the parent, subject to exceptional cases set out in s 5. Section 5 empowers (although it does not require) the court to dispense with that consent if the court is satisfied that the parent (1) has abandoned the infant; or (2) has neglected the infant; or (3) has persistently ill-treated the infant; or (4) cannot be found; or (5) is incapable of giving the consent; or (6) is withholding the consent unreasonably; or (7) has persistently failed without reasonable cause to discharge the obligations of a parent of the infant. We are only concerned in this case with the sixth of these matters.

The consent of the parent must be consent at the time of the making of the adoption order. Provision is made by s 6 for the production at the hearing of a consent signed by the parent as evidence that the parent is then consenting to the adoption order; and commonly such forms are signed and delivered to the court some time before the hearing; but if at the hearing it appears that notwithstanding the signing of

the form the parent does not *then* consent, the form is not worth the paper it is written on; and if the proposed adopters wish to pursue the adoption they must first establish by evidence to the satisfaction of the court one or more of the seven matters already listed.

It is to be observed at the outset that while the court, in deciding whether or not to make an adoption order in any case, must regard the welfare of the child as of paramount importance, this is far from the case when the court is considering an application that the consent to the order of an objecting parent should be dispensed with and his or her natural and legal rights overridden. The question whether a parent's consent is unreasonably withheld is not to be solved merely by a view formed by a court, or by a child welfare officer, or a man or woman in the street that life with the proposed adopters would be, if I may use the phrase, a better bet for the child. This truism must be clearly appreciated by any who may interest themselves in cases such as the present case. Were it otherwise the Act would have allowed consent to be dispensed with whenever the adoption order would in the view of the court be in the best interests of the child.

The mother in this case is unmarried, and now aged 23. Her parents were separated and she came down from Scotland to join her mother in London when she was 14. She stopped living with her mother when she was 17, although not in consequence of any disagreement or trouble between them. At some stage thereafter she set up house with a man and by him had two daughters now aged five and four. She and the man split up after the second child was born. The mother has always looked after these two girls, and we know of no criticism of their upbringing. Indeed the welfare officer reports favourably on this. In 1967 the mother lived temporarily with another man and by him conceived (unintentionally) the child with whose proposed adoption we are dealing. The man left her when he found that she was pregnant. The child was born on 28th March 1968.

Before the birth the mother was living in a one-room flat with the two girls. She was hoping for council accommodation, but without it felt that life with three small children would be impossible. She arranged with the appropriate authority before the birth that the child when born should be put out for adoption, which would involve going to temporary foster parents very shortly after birth. In fact the day before the birth she was offered better accommodation by the local authority, where she now lives with the two girls and a young woman cousin. Nevertheless, she had in general terms arranged for adoption and felt that she might not be able to cope with the situation of two small girls and a baby even in improved accommodation, and did not alter the arrangement. The child went to the proposed adopters ('the applicants') as temporary foster parents. This was not with a view to adoption by them. They were known to the appropriate department of the local authority as satisfactory for that purpose. In 1968 they had been married for about ten years, being aged 40 and 30, but were childless. On 28th March 1968 (a coincidence of date) they obtained an adoption order for a baby girl, and it was knowledge of this proposed adoption that led the authorities to consider them as foster parents. On 5th April 1968, the child went to them and has remained with them ever since. At the hearing before the judge on 17th July 1969 the child was therefore aged nearly 16 months, and since 5th April 1968 the mother had not seen him—nor indeed has she seen him since. The applicants—against whom as adoptive parents, let me say, nothing is to be said—had a child of their own later, a boy born in June 1969.

The applicants became very attached to the child and in September 1968 indicated to the local authority that they wished to adopt him. This no doubt was communicated to the mother. The adoption proceedings were launched on 31st January 1969. At the same time the mother was presented by the child care officer with the appropriate statutory consent form which after some hesitation, she said, she signed on

11th February 1969. She said that she was, while hesitating to sign, thinking about the child and what was best for him. The form makes it clear, as is the fact, that the consent could be withdrawn at any time before an adoption order. Just as, on the other side, proposed adopters are at liberty to withdraw their application at any time. The hearing was due on 1st April 1969; and on 30th March the mother wrote withdrawing her consent in these terms:

'I would like to withdraw my consent to the adoption of my child [naming him] Sir when I had my child I just moved into a LCC flat and I had so much to do but now I would like to have my child back as I have enough accommodation for him. I have always wanted him back. I was so mixed up at the time, I have two children with me at the moment of my own and I can look after them very well and I would like to have [the child] back with me.'

At the hearing neither side was legally represented. This case was adjourned for this purpose, and was finally heard on 17th July 1969. The judge had a welfare officer's report—that of Miss Ramsey the guardian ad litem—and oral evidence was given by the female applicant and the mother. The judge expressed himself as satisfied that the mother's consent was being unreasonably withheld, decided to dispense with her consent, and made the adoption order from which the mother now appeals on the ground that she had not unreasonably withheld her consent. I repeat that this is the only one of the seven listed matters relied on.

I turn now to such information as may be gathered from the notes of evidence and the report of the guardian ad litem welfare officer as to the attitudes and activities of the mother in the period between the time when the child went to the applicants and the time when she withdrew her consent to the adoption. I have already summarised what the mother said about her initial intention to go on with the idea of adoption in spite of the offer of better accommodation. The welfare officer reported that the mother had decided to go ahead with the plan 'despite some pressure'; 'she had no furniture for her new flat and wanted time to settle before having the [child] with her'. The report dated 28th March 1969 contained the following passage:

'The court will be aware that [the mother] has now withdrawn her consent to the adoption. She told me that she had always been undecided and had great difficulty signing the form and then giving it to the child care officer in the first instance. [The mother] has not visited the [child] since he was placed with the applicants, nor has she made enquiries as to his progress, contributed maintenance or sent presents. Her explanation is that she felt confused and knew it would be upsetting if she saw the [child]. [The mother] now feels she is in a position to offer [the child] a decent home. Her eldest daughter attends a day nursery and she has a 26 year old cousin residing with her, who gives help looking after the children and babysitting. She feels guilt about not having [the child] with her and regrets not being able to come to a decision earlier. Her mother and three sisters live locally and she tells me that they give her support and material help. [The mother] impresses me as a warm, though unstable young woman whose behaviour in the past has been inconsistent. It could be that her change of heart is motivated by her own needs and some sentimentality, and not by the best interests of the [child].'

The final passage of the report was in these terms:

'Conclusion—I am in some difficulty in making a recommendation to the court. I feel that [the mother] could offer [the] child a good home and could be a good

mother. However, one would expect the [child] to be emotionally affected by a change and I rather doubt if [the mother] would have the emotional resources to deal with such difficulties. Her motives are genuine and yet one doubts how deep her feelings are for the child after a year without contact. [The applicants] have been known to me for a longer period and I am satisfied could offer the [child] an excellent home with a great deal of love and understanding. The court may be of the opinion that the rights of the natural mother should be respected. If there is any doubt in the matter I would recommend that on balance the best interests of the [child] would lie with the applicants, who have successfully cared for him for the first year of his life and who in the future could offer him greater stability and security.'

At the hearing the welfare officer stated orally—I quote from the judge's note:

'Great emotional disturbances on [the child] if he went back to his mother. I am still of same opinion I express in conclusion of my report.'

It is I think right to set out most of the judge's note of the mother's evidence:

'... After child was born, [the child] went to the [applicants] to be fostered [I am omitting the names] I am very grateful to them. When I came out of hospital I had to go to a council flat. I had no furniture at all. I let [the child] go to [the applicants]. I had no cot. I have my cousin living with me. She pays me £5 per week and helps with children. I heard from [the child care officer] they wanted to adopt the child. ACA 5 [i.e. the consent form] handed to me by [the child care officer]. I did not sign it straight away. I was thinking about [the child] and what was best for him. I kept form about two weeks. My flat is now properly furnished. I have two bedrooms, living room, kitchen, landing and bathroom. If I have [the child] I will apply for a bigger flat. My cousin sleeps with me in a double bed. Elder girl goes to day nursery. I do not work. I get £10 4s from Ministry of Social Security. Rent is £3 13s 1d. I think I can be a good mother to [the child]. I have an uncle who visits me. He is 34. He comes about once a week. He would provide a male influence. I wanted to take [the child] back on two occasions. I sincerely want [the child] back.'

Cross-examined: 'I did not take [the child] back as [the child care officer] advised that [the child] would be best with [the applicants]. At early stage [the child care officer] said I could keep child. I felt I could not cope. If [the child] came back to me, I think he would cry. I should try and overcome it with love and affection. He is a total stranger to me and I to him.'

By court: 'When I left hospital I got bed from council. I had cooking utensils etc. for unfurnished flat. I could have had [the child] back in July, but [the child care officer] asked that I should not disturb him. I wanted [the child] for weekends.'

Cross-examined by junior counsel for the applicants: 'My mother could not have had [the child]. She was still in Swedenborg Square. Sisters had no accommodation.'

Now it is on the basis of the above that the applicants have to establish that the refusal of the mother at the hearing to consent was unreasonable. It is to be noted that the mother in July 1968 wanted to have the child for short visits, obviously to see how it would work, but was dissuaded by the child care officer on the ground that it would be upsetting to the child. I assume that the mother was told that she ought to have the child back on a permanent basis, but that short trial visits were

deprecated. I must say that I think that last advice was questionable; but the relevance to the matter now under consideration is that there was the mother, three months after the first fostering, and before anyone had appeared as potential adopter, anxious to make or renew contact with the child in one form and dissuaded therefrom by someone whose views would be likely to carry great weight with her. The other point to be particularly noted is that the experienced guardian ad litem stated in her report that she found some difficulty in making a recommendation—clearly on the question of what was in the best interests of the child.

The judge reminded himself at an early stage in his judgment, by reference to a quotation by PEARSON LJ in *Re C (an infant)* (1) quoting LORD DENNING MR in *Re L (An Infant)* (2) that the welfare of the child is not on this point the sole consideration. It is indeed not even the paramount consideration. He then set out the facts and continued:

'The child is now some 16 to 17 months old. There is no doubt to my mind—there is no medical evidence about it but I must be entitled to know it—inevitably it seems to me that to remove a child from the only home it has known and to put it in care of a stranger would, I think, not only disturb the child emotionally and cause untold tears and unhappiness and there might be a psychological disturbance as well. There is no medical evidence before me but it seems to me that one is entitled to take it into consideration as (pertaining to) the welfare of the child. [He then quoted passages from the report of the guardian ad litem and continued:] [Junior counsel for the applicants] said in her address that there must be an enormous question mark as to the [mother]. This was a perfectly legitimate comment. There was no reason why she should have not married the second man. [It is not an important point, but as the man walked out as soon as he found that the mother was pregnant a successful marriage would not seem to have been likely. The judge continued:] It does seem she does make relationships with men which are very unsatisfactory as far as one can see. She may be unlucky. I can't put it out of my mind. I asked her if another unwanted child might arrive on the scene. "No", said the mother. I can't help feeling there is a grave risk of another association and another unwanted child arriving on the scene. A grave risk. Again I asked the mother about getting married. What if a man says "Sons of my own, yes, but sons of another man, no. Not a bastard". There must be inevitably, to my mind, a risk of that some time in the future. Doing the best I can—I find this case difficult—looking at the matter quite dispassionately and saying what should a reasonable mother do in these circumstances—consent or refuse consent—I take the view, getting the guidance I can from the cases—I take the view that the reasonable mother should consent in all the circumstances of this case. It is inevitable—it must be the best for the welfare of the child. In all the circumstances I feel she is unreasonably withholding consent in this case. I order that her consent should be dispensed with.'

Taking the case as a whole I cannot escape the conclusion that the judge's decision went entirely on his view as to the best interests of the child, notwithstanding his self-reminder that on this point that was not the sole consideration. It is, of course, right to say that there may be cases in which the circumstances related to the welfare of the child are such that no mother acting reasonably should withhold consent to the adoption; but it seems to me that this requires a clear prognosis of relative harm to the child if the adoption order is not made. An 'exceptional case' as was said by this

(1) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(2) (1962), 106 Sol Jo 611.



court in the *Re K (an infant)*, *Rogers v Kugmicz* (1), approving *Hitchcock v W B* (2). Just because one mother in particular circumstances acting reasonably would give consent, it does not mean that another mother in the same circumstances would act unreasonably in refusing consent. The test is objective, but reasonable people may adopt different attitudes and arrive reasonably at different conclusions in similar circumstances.

I am prepared, as was the learned judge, to accept without specific evidence in the case that a medical view would be expressed that as a general statement there is a risk of psychological disturbance to the child if he is parted from the applicants. My experience of such medical evidence in other cases is that there is no means of quantifying this risk, the cases in which no harm has been done naturally not coming to the attention of the psychiatrists. Moreover, in many cases that do so come there may be other matters predisposing a particular individual to psychological disturbance. Further, it is accepted as a general statement that psychological disturbance may arise on an adopted child discovering that the adoptive parents are not the child's true parents.

But if the question of the psychological welfare of the child rests merely—as here—on a general view such as I have stated, and not on any particular medical evidence special to the particular child, I do not find myself able to conclude that a mother on being apprised of that view is acting unreasonably in withholding her consent to adoption. Nor do I consider that the withholding becomes unreasonable because in addition the child, if it is to be brought up by the mother, will be materially less well off than with the proposed adopters. Nor do I consider that a mother is being an unreasonable mother because she does not share with the court a pessimistic view as to her future relations with men.

Before completing the draft of this judgment I had the advantage of reading the judgment that Cross LJ is about to deliver, and I need not refer to the authorities to which he refers. None of them requires me to come to the conclusion that this is a case in which consent was unreasonably withheld, and in general they support the view that it was not.

In summary I am of the opinion that while this is a case in which a mother might reasonably consent to the proposed adoption, it is also a case in which the court should not be satisfied that a mother would be acting unreasonably in withholding her consent. I venture to repeat that where the experienced guardian ad litem in the case expresses herself on the question of adoption as being 'in some difficulty in making a recommendation to the court', I find it difficult to sustain the view that the child's own mother is acting unreasonably in deciding to withhold her consent to the adoption.

Accordingly, I would allow the appeal and discharge the adoption order. Our order should contain any necessary direction to the Registrar General as to cancellation of entries under s 24 (3) of the 1958 Act.

I add that I am in agreement with the suggestion, that SACHS LJ will make, that it is desirable that in cases where it is to be alleged that consent is being unreasonably withheld, particulars of the matters relied on should so far as is practicable be given in advance of the hearing; thus the parent will know in advance the case made against him or her on a matter in which the burden of satisfying the court is on the shoulders of those supporting the adoption.

**SACHS LJ:** The appellant is the mother of the child, born on 28th March 1968. The applicants are the foster parents to whom the child was entrusted for care, on

(1) 117 JP 9; [1952] 2 All ER 877; [1953] 1 QB 117.

(2) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.

reward from the local authority, just after its birth. They wish to adopt the child. The mother does not consent.

The bond between mother and child is perhaps the strongest that nature forges. It is open to the court in certain circumstances to sever that bond. Any such severance is complete and irrevocable. The mother ceases in law (s 7 (1) (a) of the Adoption Act 1958) and in truth to be a parent; she is not entitled ever to see the child in infancy again—indeed it is normally undesirable that she should. As against a mother unwilling to have the bond severed, the order of the court imposes a grave penalty.

One of the circumstances in which the court is entitled to sever the link is if the mother's refusal to consent to the adoption is held to be unreasonable. The dominant question in the present case is what is the proper approach to the issue whether such a refusal is unreasonable. It is an important question, to which members of this court have in the past devoted much care and delivered cogent and closely reasoned judgments. Of these the most powerful and authoritative is that of JENKINS LJ when giving the considered judgment of a court strong in width of relevant experience in *Re K (an infant)*, *Rogers v Kuzmiec* (1), which incidentally expressed unqualified approval of the considered reasoning of the Divisional Court in *Hitchcock v W B* (2). In the main the principles of approach are thus well settled, but on a few important points it appears on analysis that there may be a divergence of principle between some statements in that decision and those in more recent cases, and also as between some of the statements in those later cases. Some of these may merely be due to the application of principles to special facts. But where conflicting views are to be found it is right to revert to those expressed by JENKINS LJ. These have at all times bound this court, and no portion of that penetrating and humane exposition of the protection afforded to a mother by the Adoption Act 1950 has in any later case been the subject of criticism. Moreover that authoritative decision had been uniformly followed during the years that preceded the passing of the 1958 Act which, in ss 4 (1) and 5 (1), repeated those provisions of earlier legislation which had been considered in that judgment. The legislature must thus be taken to have in effect incorporated the principles laid down in that judgment in the 1958 Act, and it is for this court to honour the intentions of the legislature.

We have in the present case had the benefit in this court of particularly full and careful argument and a comprehensive citation of authorities. From the latter there emerged plain guidance on a number of points which will be noted later. On some, however, difficulties became apparent in relation to certain matters which substantially affected the mind of the learned county court judge and also on others which counsel for the applicants urged should be taken into account on this appeal. It is convenient first to seek to resolve those difficulties.

Particular matters mentioned by the judge were first the risk of long-term psychological injury to the child; secondly, the better material position of the applicants; and, thirdly, the irregularity of the mother's past life. In addition it was suggested in this court that adverse weight should be given to the mother's vacillation and to any damage that has been or might be caused to the interests and feelings of the applicants—although the first of those contentions was later abandoned. It was the conduct of the mother with regard to each of the above matters, save the last, that was relied on on behalf of the applicants.

As a preliminary to dealing with each of them in turn, two questions call for an answer. What is the nature and degree of conduct which may deprive a mother of her right to be a parent? By whose standards does one judge what is reasonable? That such conduct must be culpable is, of course, clear from the analysis of the

(1) 117 JP 9; [1952] 2 All ER 877; [1953] 1 QB 117.

(2) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.

relevant provisions of the 1950 Act by JENKINS LJ in *Re K* (1), his reference to the need to establish something not far short of the highly culpable offences referred to in s 5 (1) (a) of the 1958 Act, and the view expressed that the cases in which it can be held established must be 'exceptional'. After a similar analysis DIPLOCK LJ in *Re C* (*an infant*) (2) used the phrase 'callous or self-indulgent indifference' to define the test. In short the degree of culpability to be established is high—as one would expect when an order is sought that has penal aspects. Moreover, using the standard tests to be found in the judgments in *Hornal v Neuberger Products Ltd* (3) the degree and clarity of proof demanded is that appropriate to the importance of an 'extremely serious matter', to cite the words of LORD GODDARD CJ in *Hitchcock's case* (4).

Are the standards of reasonableness those normally applied by a welfare officer accustomed to regard the child's interests as paramount or those of a mother who genuinely wishes to remain a parent? Clearly not the former—for that incidentally would be to confuse custody and adoption proceedings contrary to the authorities which will be later cited. Nor is the standard that of some hypothetical mother. There exists no Clapham omnibus designed to accommodate all mothers. The court is concerned in each case with the particular mother in her own circumstances and environment and full weight must be given to the individual mother's natural desires in relation to her child. Mothers, like judges, may differ as to what is reasonable, and yet not be unreasonable. Having had the advantage of reading the judgments of RUSSELL and CROSS LJ, I respectfully find myself in full agreement with what they say on this subject. The onus lies squarely on whoever asserts a mother is unreasonable—and it has been rightly said more than once that a mother who genuinely wishes to remain a parent, is able and willing to support the child, and has not offended against s 5 (1) (a) or (2), ought not normally to be held to be unreasonable in refusing consent.

On that basis I turn to the risk of psychological long-term disturbance to the child; this seems to have been a matter which the county court judge regarded as of high importance—perhaps the most important and one much pressed in this court. There was no medical evidence before him, but I am prepared to assume that judicial notice can now be taken of the existence of such a risk—or alternatively to assume that there will never be a lack of psychiatric experts to provide some evidence to that effect. Equally, I would assume, judicial notice can be taken of a second and better known set of risks occurring when a child is told that the parent it has been taught to regard simply as 'mother' is not truly the child's mother. Whether one set of risks is greater than the other could be a matter of dispute.

Exceptional cases apart, the court does not put the first risk into the scale for a number of reasons, of which I will mention two. First, the risk is speculative (cf per ORMEROD LJ in *Re W* (*an infant*) (5) as cited in *Re C* (2) and at highest one of many speculative risks which must be taken in any adoption case. Secondly, and perhaps most importantly, it cannot be unreasonable for a mother, even if apprised of the normal risk, to consider that she can overcome this risk at the same time as the short-term disturbance which any change involves for an infant. Again I respectfully endorse what ORMEROD LJ said in *Re W*—as cited in *Re C*. There can of course be cases where there is a special risk (as there was in *Re L* (*An infant*) (6) or in *Re C*) and it could be culpable conduct of a mother to ignore it. But that would be unusual and must be strictly proved by the evidence in that particular case. (See the judgment of PEARSON LJ in *Re C*.)

(1) 117 JP 9; [1952] 2 All ER 877; [1953] 1 QB 117.

(2) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(3) [1956] 3 All ER 970; [1957] 1 QB 247.

(4) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.

(5) (1963), unreported.

(6) (1962), 106 Sol Jo 611.

For my part, I consider such proof must be really strong, and am concerned with the dangers of a whole class of adoption cases being in effect decided by the psychiatric specialist profession. Moreover, to decide these cases on such a basis can only too easily result in the courts' descending the slippery slope of a custody type welfare contest between mother and foster parents. This would have results wholly contrary to the legislature's intentions as manifested by passing the 1958 Act after the decision in *Re K* (1) and incidentally the considered judgments in *Hitchcock's* case (2) and *Watson v Nikolaisen* (3).

Assuming the true mother is in a position to look after the child in a way that provides reasonably for its accommodation, food and health, the better material position of the proposed adopting parents is clearly shown by the authorities not to be relevant to the issue of consent—a millionaire has no more claim to deprive a mother of her child than a milkman. Nor can it normally be put into the scales against the mother that her position may change in the course of time—otherwise unmarried mothers and widows without worldly endowments would always be at risk. Nor can the fact that her past was irregular—at any rate if she has for a reasonable time been living in a steady manner. I have deliberately refrained from adding 'of itself' to the words 'put into the scales'. It can be only too easy in this class of case to fall into the dangerous trap of adding nought to nought and producing some digit or digits. That is particularly so in regard to welfare factors to which a court is used to giving weight in custody proceedings.

Of the points taken in this court, although not apparently at first instance, the first related to alleged vacillation. For a mother to change her mind is permissible and indeed natural (*Re K* (1)). Moreover it is well recognised that during the period following the birth of a child the mind of a mother is especially susceptible to disturbance (cf the Infanticide Act 1938). In addition, nowadays, a mother can find herself under persuasive pressure from welfare officers, her family, doctors and others—any one of whom can affect her mind in one direction or another. Unless the vacillation is at least of a high order—'bewildering', as occurred in *Re W* (4)—it cannot be put in the scales against a mother. Whether it must also be shown to be likely to harm the child by putting its future at risk, or whether the interests of the proposed adopters can properly be taken into account, is a matter to which later reference will be made. As, however, counsel for the applicants towards the end of his address rightly conceded, there is no evidence of undue vacillation here, no more need be said on this point, save that it affects the next to be mentioned.

There remains the question whether and to what extent the interests of third parties, and in particular the proposed adopters, fall to be considered. The Act sets out a number of instances where the mother's culpable conduct *against the child* may deprive her of the protection given by s 2 (4) (a) of the 1950 Act; it mentions none of *conduct towards others*. No case prior to 1962 has been cited in which *conduct towards others* was held to be culpable; moreover, the judgment in *Re K*, (1) at least implicitly and perhaps explicitly later, excludes from consideration as a general rule the claims of foster parents. Then came *Re L* (5), a case with movingly exceptional features in which the effect of the mother's conduct in relation to the interests of the foster parents was taken into account against her; later that approach was followed in *Re C* (6), in which it is also envisaged by PEARSON LJ that 'others' may have interests

(1) 117 JP 9; [1952] 2 All ER 877; [1953] 1 QB 117.

(2) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.

(3) 119 JP 419; [1955] 2 All ER 427; [1955] 2 QB 286.

(4) (1963), unreported.

(5) (1962), 106 Sol Jo 611.

(6) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

to be considered (but see *DIPLOCK LJ* as to the grounds for this). The reasoning in *Re K* (1) was, however, in no way criticised in either case. There *JENKINS LJ* referred to this matter as follows:

'the remarkable consequence would ensue that foster-parents entrusted for reward with the care of a child by a parent not for the time being able to provide it with a suitable home could in due course confront the parent with an application to adopt the child which the parent would be unable to oppose.'

I respectfully follow and endorse that approach, which incidentally has its bearing on the question of psychological consequences. (It has already been indicated in another helpful considered judgment, *Watson v Nikolaisen* (2), that the relevant passages on this topic are unlikely to be intended to cover only cases where the parent has contributed to the cost of the child.)

In the instant case there has been no undue vacillation and no other conduct has been alleged to be culpable vis-à-vis the applicants, so counsel for the applicants' point as to the latter's interests fails on the facts. Thus I am absolved from considering whether conduct, which is not culpable *against the infant* and does not harm him but is in exceptional cases so against the interests of the foster parents in law as to constitute culpable conduct, can entitle the court to hold that the mother was unreasonable and thus to deprive her of her protection. Suffice it to say that there seems to be a conflict of authority as to how the Act should be interpreted and the point is one which may well have to be resolved in due course elsewhere when an appropriate case arises. In any event that conduct must be exceptional. For my part I am impressed by the fact that in all cases where it is sought to sever the natural bond between mother and child against the will of the former, the court is in truth being asked to apply penal provisions of an Act, and if there are two reasonable interpretations of the effect of those provisions it must apply the one least adverse to the mother whom it is sought to penalise.

So much for the points of difficulty raised in the course of argument. I can now return to the general pattern of the approach to an issue of whether a parent 'is withholding consent unreasonably'. Such has been the care devoted in the courts to the approach appropriate to this important and difficult question that the judgments on this matter have of necessity been lengthy. Accordingly, before turning to the facts in the instant case, it may be of some general service to state in compact form, even at risk of a degree of repetition, the points that fall to be kept in mind as relevant to the approach to the present decision—including both those which are well settled and those which it has been necessary to discuss earlier in this judgment because of certain difficulties. (i) The provisions of s 4 of the Act that there shall be no adoption of a child without the consent of the parent are for the protection of the parent (cf per *DIPLOCK LJ* in *Re C* (3)). (ii) That protection can be destroyed by clearly establishing the mother to be guilty of conduct culpable to quite a high degree (cf *Re K* (1)). (iii) It is not only wrong to apply the welfare tests appropriate to custody proceedings as being a primary consideration in an adoption case; it can be confusing and misleading so to do (*Re K*; *Watson v Nikolaisen* (2)). The conduct of a mother in disregarding the welfare of her child can, however, be shown to be culpable (see per *DIPLOCK LJ* in *Re C*). (iv) When a mother genuinely desires to look after a child, is a reasonably good mother, and is able to provide for the child's needs,

(1) 117 JP 9; [1952] 2 All ER 877; [1953] 1 QB 117.

(2) 119 JP 419; [1955] 2 All ER 427; [1955] 2 QB 286.

(3) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.



it is very difficult to say that she is unreasonably refusing consent (cf *Hitchcock's* case (1) per DEVLIN J). 'Prima facie it would seem . . . eminently reasonable for any parent to withhold . . . consent'—see *Re K* (2). (v) The following factors cannot be taken as showing culpable disregard by a mother of her child's welfare: (a) the material benefits to the child of being with adopters who are better circumstanced (*Re K*; *Re C* (3) per DIPLOCK LJ); (b) the fact that she considers she can overcome any psychological risks normally inherent in taking over care of her child from foster parents—where exceptional risks are established each case falls to be considered on its particular facts—see authorities already cited; and (c) irregularity in her life—if she is able properly to look after her child (*Re K*). (vi) It is wrong to take adverse account of a mother's withdrawal of consent to adoption; on the contrary it is permissible (*Re K*) and indeed it is natural and to be expected that a mother may change her mind on this matter (*Re K*). Exceptionally prolonged and repeated vacillation can be regarded as culpable conduct, at any rate if it affects the child. (vii) The standard by which the mother's conduct and reasonableness is to be assessed is not that of a welfare officer but of the mother in her particular circumstances, having due regard to the effect of the natural bond between mother and child. (viii) Unreasonableness in withholding consent is a question of fact, which must be proved by those who assert it as a condition precedent to any exercise of the court's discretion on the basis of the provisions of s 7 of the Act. As a question of fact it falls to be reviewed as such by an appellate court in appropriate cases, and any deviation from the proper approach to the issue can set that question of fact at large.

To resolve the contests between a parent and proposed adopters on the basis that normally the correct test is to take the course which is in the better general welfare interests of the child is plainly wrong. It ignores the necessity first to establish culpable conduct by the parent. To change to that test from the approach laid down by the Act could entail far-reaching and grievous consequences as against parents unwilling to forfeit their parenthood. It is, of course, (as was pointed out by Cross LJ at first instance in *Re W (infants)* (4) and as he is about to mention in his judgment in the present case) open to the legislature after considering those consequences to make such a change. It is not open to the courts, by adopting a 'welfare' approach to the concluding words of s 5 (1) (b), to effect by a side wind a change contrary to the legislature's intentions.

Before returning, in the light of the approach which the authorities show to be appropriate, to the facts of the present case and to the judgment of the county court judge touching those facts, I would first like to express some sympathy with him and indeed with the scores of other judges and justices before whom may come contested adoption proceedings. It is only too easy for them to go wrong when faced by the citation of relatively short passages from amongst the many long judgments given on the subject.

It is not necessary for me to recapitulate the facts which have been recited in the judgment of RUSSELL LJ. It is enough to say that this is a case where the mother is someone of whom it was neither said, nor could be said, that she was in any way a bad mother; indeed she had obviously looked after her other two children well. Nor was it said, nor could it be said, that with the aid of social security she was not in a position to look after the children. Nowhere in the judgment is there really a suggestion that she had been guilty of any culpable conduct. In particular it is not sought to blame her for her conduct in relation to the welfare of the child. Nor can it be said that she abandoned the child either in the sense that word is used in

(1) 116 JP 401; [1952] 2 All ER 119; [1952] 1 QB 216.

(2) 117 JP 9; [1952] 2 All ER 877; [1953] 1 QB 117.

(3) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(4) 129 JP 550; [1965] 3 All ER 231.



s 3 (1) (a) (see *Watson v Nikolaisen* (1) or, despite counsel for the applicants' submissions, in any other relevant sense. On the contrary she acted sensibly and no fault can be attributed to her for following a welfare officer's advice.

Having, with these matters in mind, read and reread with anxious care the judgment delivered in the instant case, it seems clear that taken as a whole it is what might be called a 'welfare' judgment in which there has been followed step by step a welfare report of a welfare officer. The unfortunate fact is that fundamentally the learned county court judge has fallen into error as regards his approach through overreliance on a passage in a judgment in the exceptional case of *Re L* (2) without being referred to the preceding considered judgments which deal so fully with the problems of adoption cases as a whole. It is, indeed, a classic instance of the dangers of descending the slippery slope to which reference has been made and thus not having proper regard to the difference between custody and adoption proceedings respectively.

In those circumstances it is necessary in this court to come to one's own conclusion on the question of fact whether the mother has unreasonably withheld her consent. For this purpose it suffices briefly to deal with each of the factors which appeared to weigh at first instance and then to have regard to those factors as a whole. It is in essence a simple case once a correct approach is adopted. Taking first the question of long-term psychological risks. There was no medical evidence. There was no suggestion of any exceptional risk. On the principles already discussed these risks cannot be put into the scales against the mother. As regards the better material position of the applicants, this is irrelevant, and also cannot be put into the scales. As to the mother's past irregularity of life, counsel for the applicants conceded that if what was stated in *Re K* (3) by JENKINS LJ correctly sets out the proper approach then that irregularity cannot be put into the scales in this case. I consider that that statement should be followed. The Adoption Act 1958 is not (as counsel for the applicants also rightly conceded) a piece of legislation intended to deprive even prostitutes of the right of parenthood if they are in fact good mothers. There is again nothing under this head that can be put into the scales.

The other points taken on behalf of the applicants have already been dealt with. While having, I hope, every sympathy with foster parents who in the nature of things come to love the youngsters in their care, they must know that they have as such no claim on the infants and are at risk of a sad break. Only if there is culpable conduct by the true parents can they step in without the consent of the latter.

Looking then at the position as a whole, we were invited by counsel for the applicants to take account of the cumulative effect of all the matters referred to by the learned county court judge and those raised in this court. That would involve adding nought to nought and produce a digit. Such a process would be wrong. The plain fact is that the conduct of the mother has not been established to be culpable either as regards the welfare of the child nor in any other relevant direction. She has not been shown to be unreasonable and I too would allow the appeal. I would add that the difficulties which can arise in this class of case are by now manifest. Accordingly, to enable the issues to be properly considered at first instance, the courts should in future ensure that the proposed adopters give before trial particulars of the matters relied on to show that a parent is unreasonably withholding consent to adoption.

**CROSS LJ:** If the court has power to make an adoption order, the probable effect of making it on the welfare of the infant will be the governing consideration in

(1) 119 JP 419; [1955] 2 All ER 427; [1955] 2 QB 286.

(2) (1962), 106 Sol Jo 611.

(3) 117 JP 9; [1952] 2 All ER 877; [1953] 1 QB 117.

the mind of the judge when he decides whether or not to make it. But the Adoption Act 1958 prescribes various conditions which have to be satisfied before the power to make an adoption order arises. The conditions in ss 4 and 5 are directed to safeguarding the position of the natural parents. Section 4 lays down the general principle that an adoption order cannot be made unless the parents consent to its being made; but s 5 provides that the court may dispense with such consent if one or other of certain specified states of fact exist. Two of them—namely that the parent in question cannot be found or is incapable of giving his or her consent—are cases in which it is not possible to ascertain whether or not the parent in question is willing to consent. Four of them—namely that the parent has abandoned, neglected or persistently ill-used the child or has persistently failed without reasonable cause to discharge the obligations of a parent—are cases in which the behaviour of the parent in question towards the child has been such as to make it right that he or she should forfeit the right to veto the adoption.

It is, unfortunately, not so clear to what sort of circumstances the remaining case—namely that the parent in question is 'withholding his [or her] consent unreasonably'—is intended to relate, for the Act does not specify what standard or degree of unreasonableness is envisaged. One approach to the problem would be to say that since a reasonable mother thinks first and foremost of the welfare of her child, if the court is satisfied that its welfare will be promoted by the making of the order the mother is acting unreasonably in refusing her consent. In my judgment, such an approach to the problem cannot possibly be right. In the first place if it is right, then the Act might simply have provided that the consent of a parent might be dispensed with if the court was satisfied that the welfare of the child would be promoted by the making of the order. Indeed no reference to parental consent would really be needed at all since the court would never make an order if it did not think it was for the benefit of the child that it should be made.

But quite apart from this point there are several other considerations which, to my mind, show that what I may call the 'welfare' approach to the words in question is not right. First, although it is no doubt true that a parent who agrees with the judge that his child will benefit by being adopted, and gives his consent accordingly, can be said to be acting reasonably, it does not follow that a parent who disagrees with the judge is acting unreasonably. In many cases whatever standard of reasonableness you postulate, two views may reasonably be entertained. Secondly, one must remember that a parent faced with the question whether or not to consent to the adoption of his or her child may well not be in a perfectly 'reasonable' frame of mind. The mother of an illegitimate child, for instance, may be torn by conflicting emotions; on the one hand the feeling that she ought to be a mother to her child, on the other the feeling that the child may well be better off if adopted. Consequently she may vacillate and change her mind. In finally deciding (if she does so decide) to keep the child, she may take what a detached observer would think was an over-optimistic view as to her ability to cope with the child. Again she may in the view of a detached observer underestimate the risk that the transfer of the child from the proposed adopters to herself may affect the child adversely. But the detached observer might well say: 'Although anyone who could view the problem with detachment as I can would say, as I do, that she is making the wrong decision, I can quite understand her point of view and judging her by the standards appropriate to a woman in her position, I do not think that she can be said to be acting unreasonably'.

Again, to take a third possibility, one may have a calm and detached parent who says: 'Yes, I agree that my child would probably be better off—not simply materially but in every sense of the word—if he was adopted. But, after all, it is my child and though I shall not be able to do as well for the child as the proposing adopters I am not hopelessly unsuitable as a parent and I want to have a try'. Can such a

parent be said to be acting unreasonably within the meaning of the section if she refuses her consent?

Assuming for a moment that there is no authority the other way, all these considerations lead me to think that the section envisages a degree and standard of unreasonableness which although not amounting to positive misconduct with regard to the child does not fall far short of it. To bring a case within the section, the court, I would think, must be able to say: 'This is really too much. Making every allowance for the difficulty of your position, in refusing your consent you are failing to face up to obvious facts. You are shutting your eyes to a blameworthy degree to the very serious consequences which your refusal of consent will almost certainly entail for your child'.

I turn now to see whether there is anything in the decisions inconsistent with that view of the meaning of the words. I will take them in chronological order. The decision of the Divisional Court in *Hitchcock v W B* (1) is wholly consistent with this view. I would refer in particular to the words of LORD GODDARD CJ:

'if all these circumstances exist I can see no reason why a father can be said to be acting unreasonably if he says, "Good as it might be for my child to be adopted and looked after by somebody else, I am not prepared that my child should be removed entirely out of my life and no longer be a member of my family and that I should be as if I had never had the child at all".'

Again the decision of this court in *Re K (an infant)*, *Rogers v Kuzmicz* (2) is consistent with it. JENKINS LJ said that to come within the words a case which did not fall within one of the other sets of circumstances envisaged by what is now s 5 would be an exceptional one. Moreover, he stressed the distinction between custody cases and adoption cases.

Next comes *Re L (An infant)* (3) which is referred to in *Re C (an infant)* (4). It may well be possible to justify the decision in that case even on the narrow interpretation which I would put on the words in question, but LORD DENNING MR in his judgment in *Re L* certainly used language which, read without regard to the very unusual facts, might suggest that in his view the section envisages a higher standard of reasonableness than, apart from authority, I would think that it envisages. Next comes another case, *Re W (an infant)* (5), also referred to in *Re C*, which is in no way inconsistent with the view which I have expressed. Finally there is *Re C*. In that case DIPLOCK LJ expressed the view that to come within the words a mother must at the least display a 'self-indulgent indifference' to the welfare of her child. That accords entirely with my view, although I am not altogether sure that I would have thought that on the facts the mother's attitude in that case satisfied that test. PEARSON LJ, on the other hand, quoted with approval the passage in the judgment of LORD DENNING MR in *Re L* (3), to which I have referred. In this state of the authorities I do not think that I am precluded from applying the stricter test—indeed I think that the preponderance of authority is in its favour.

I turn now to the facts of this case. It certainly cannot be suggested that the mother was in March 1969 so palpably unfit to look after the child in question as well as her two other illegitimate children that her refusal to consent to his adoption could be described as 'unreasonable' on that ground. Such a conclusion would be altogether inconsistent with the views expressed by the welfare officer in the concluding

(1) 116 JP 401; [1952] 2 All ER; 119; [1952] 2 QB 561.

(2) 117 JP 9; [1952] All ER 877; [1953] 1 QB 117.

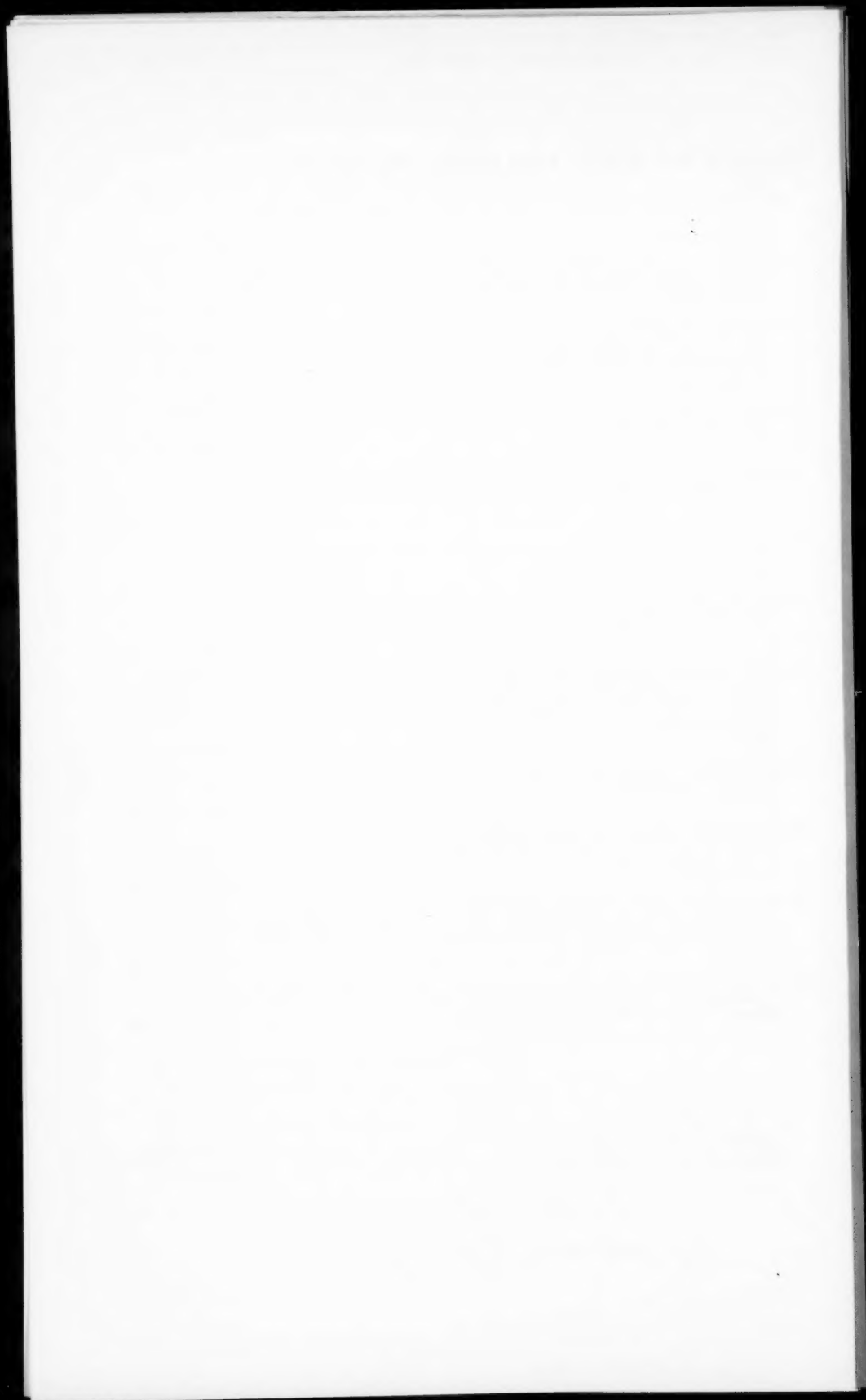
(3) (1962), 106 Sol Jo 611.

(4) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(5) (1963), unreported.

## CASES IN THIS VOLUME TO DATE

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<b>TOWN AND COUNTRY PLANNING</b> – Permission – Refusal – Authority required to purchase land – Compensation – Assessment. <b>Margate Corporation v Devotwill Investments Ltd</b> .. .. .	HL	19



paragraph of her report. Further, if that were true in March 1969, it must have been equally true in July 1968, but it is common ground that if the mother had changed her mind about adoption then no one could have said that she was acting unreasonably. The case against her must rest entirely on what she did or did not do between July 1968 and March 1969. Two of the points which counsel for the applicants took with regard to her conduct during that period—although they were not in fact taken by the judge—do not in my judgment tell against her at all. The first is her failure to visit or keep in touch with the child. Now, according to the evidence, when the child care officer told her that she must make up her mind one way or the other with regard to having the child adopted, the mother suggested that she should try having the child with her at weekends to see whether or not she could cope. The child care officer may possibly have been right in opposing that suggestion, but it was not on the face of it an unreasonable one and it is quite inconsistent with the view that the mother had no real interest in this child until for some unknown reason she suddenly changed her mind in March 1969. By acquiescing in the view of the child care officer that if she was not prepared to give up the idea of adoption altogether and take back the child she must sever her ties with him completely, the mother certainly laid herself open to the argument which is urged against her that by March 1969 she had lost contact with the child for so long that it was unreasonable of her to refuse consent to his adoption. But one cannot fairly also stigmatise her as a mother who had no interest in her child and give her so to say additional black marks for not seeing him between July and March.

Another point urged against the mother is the fact that she signed a formal consent to the adoption on 11th February 1969. In my judgment there is nothing in that point. She had given consent in principle to his being adopted from, or indeed from before, the date of his birth and she was consenting to his being adopted by the applicants from September onwards. The form of consent which she signed—which stated on its face that she could retract it—was merely evidence on which the court could act if she did not appear at the hearing. It carried the matter no further so far as the applicants were concerned and the case against her would have been just as strong or weak if she had never signed any consent before she retracted the consent, which she had in effect given months before, in March 1969. The whole question, as I see it, is whether by March 1969 the mother had acquiesced for so long in her child being cared for by the applicants first as foster parents and then with a view to adoption that to retract her consent in March displayed, to use DIPLOCK LJ's words, 'self-indulgent indifference' to the welfare of the child and, so far as it is relevant, self-indulgent indifference to the feelings of the proposed adopters.

The task of the judge in deciding custody cases—and indirectly, therefore, in deciding contested adoption cases—has undoubtedly been made more difficult than it used to be by developments in medical thought over the past 20 years or so. Before the war it was, I think, generally assumed that although he might be made temporarily unhappy, a young child would not be lastingly disturbed by being transferred, even after a prolonged stay, from the care of foster parents or prospective adopters to his natural parents if both were approximately equally well qualified to look after him. But nowadays specialists agree in saying that there is some risk of lasting emotional disturbance to any child who is removed from the care of one woman to that of another between the ages of six months and 2½ years. They are not, however, able to estimate the degree of risk nor to compare that risk with the risk which admittedly exists that a child who is adopted in infancy may be emotionally disturbed when he learns years later that the adoptive parents are not his real parents. But although the problem has been undoubtedly to some extent complicated by this development of medical opinion, I do not think that the complication affects this case. In the first place as no medical evidence was in fact given I do not think that



one can fairly attribute to the mother the knowledge of Harley Street opinion which she would have had if she had been used to hearing wardship cases. Secondly, even if general evidence not directed to any particular features of the actual case had been given, I do not think that a mother who maintained her wish to retain her status as a mother in face of such general evidence could be considered to be acting unreasonably within the meaning of s 5 of the Act. In this connection I would respectfully adopt what was said by ORMEROD LJ in the unreported case, *Re W* (1) referred to in *Re C* (2).

I turn now to the question of the effect of the refusal on the applicants. I am prepared to assume for the purpose of this judgment that the effect of a refusal of consent on the happiness of the applicants is a matter to be taken into account in considering whether consent has been unreasonably withheld; it is, indeed, probably only on that footing that the decision in *Re L* (3) can be justified on the narrow construction of the wording of the section. But even on that footing one must bear in mind that prospective adopters are themselves entitled to refuse to adopt the child in question if during the probationary period they decide for one reason or another that they do not want to go on with the adoption and that they know perfectly well that they are taking the corresponding risk that the natural parent or parents may change his or their minds during that period. It is, I think, on any footing only in extreme cases—such as *Re L* (3)—that the distress caused to the proposed adopters has great relevance and on the facts of this case I cannot think that it has any appreciable weight.

To decide this case in favour of the applicants would, as I see it, go further in the direction of the 'welfare' approach than any case has yet gone. On the facts, it would be harder to justify on the narrow construction than *Re C* (2) and would be quite inconsistent with the decision in *Re W* (1), which PEARSON LJ recognised as a stumbling block in the way of the decision at which the court in fact arrived in *Re C*.

In deciding as he did in this case, the judge, in my view, applied the wrong test. The question which he asked himself was: 'Am I satisfied that the making of the adoption order will promote the welfare of this child?' and not, as I think that it should have been: 'Am I satisfied that making every proper allowance for the difficulty in which the mother finds herself, she, in refusing her consent, is failing to face up to the realities of the case and is shutting her eyes to a blameworthy degree to the obvious dangers to which she is exposing the child?'. Accordingly, in my judgment, this appeal should be allowed. To hold a balance in adoption cases between the interests of the child and the claims of the natural parents is obviously difficult. It may be that today informed opinion would attribute more weight to the interests of the child and less to the claims of the parents than it did in 1958. I have no views one way or the other; but if the balance is to be tipped in favour of a purely 'welfare' approach then that result should be achieved by Parliament after full consideration of all that is involved and not by the court putting a construction on the words 'withholding unreasonably' in s 5 which they were not, in my view, intended to bear.

In conclusion I would add that I agree with Sachs LJ in thinking that those who ask the court to dispense with the consent of a parent on the ground that it is being unreasonably withheld should furnish the court and the parent in question with particulars of the matters on which they rely as showing that the parent is acting unreasonably. I agree that this appeal should be allowed.

*Appeal allowed.*

Solicitors: Wallace Bogan & Co; T V Edwards & Co.

H.S.

(1) (1963), unreported.

(2) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(3) (1962), 106 Sol Jo 611.

**COURT OF APPEAL (CIVIL DIVISION)**

(DAVIES, WINN AND KARMINSKI, LJ)

8th, 9th, 10th, 13th July, 8th October 1970

Re B (an infant)

*Adoption—Consent—Dispensing with consent—Unreasonable withholding of consent—Unreasonableness—Refusal involving serious risk of affecting future happiness of child—Adoption Act, 1958, s 5 (1) (b).*

Consent to an adoption order may be withheld 'unreasonably' within the meaning of s 5 (1) (b) of the Adoption Act, 1958, even though there is nothing culpable or blameworthy in the refusal of consent. The test of reasonableness of the withholding is whether a reasonable parent would regard a refusal to permit the adoption of the child as involving a serious risk of affecting the whole future happiness of the child.

APPEAL from Bournemouth County Court.

John Davies, QC, L J Blom-Cooper, QC, and Caroline Rogers for the intending adopters. A W M Davies QC and R M S Shawcross for the mother.

*Cur adv vult*

8th October. The following judgments were read.

**DAVIES LJ:** This appeal concerns a male child born to the mother on 5th April 1969. The mother had originally given her consent to the adoption, but subsequently she withdrew it; and the basis of the application before the county court judge and of the appeal before this court was the contention on behalf of the applicants that in the circumstances the court ought to dispense with the consent of the mother to the making of the order on the ground that she was withholding her consent unreasonably within the meaning of s 5 (1) (b) of the Adoption Act 1958. The learned county court judge in a full and careful judgment decided that the applicants had failed to make out their case.

The appeal was heard in this court on 8th, 9th, 10th and 13th July 1970. On the last of these dates, at the end of the submissions of counsel, it became obvious that it was necessary to put into writing the reasons for the decision at which we had unanimously arrived, namely that the appeal should be allowed and that the adoption order should be made. Nevertheless, in order that the parties should not be left in suspense, we thought it right to announce our decision forthwith in open court without at that stage giving any reasons, and we accordingly did so.

It is necessary to go in some detail into the past history of the mother, Mrs B, as she now calls herself, and the man B with whom she was living at the date of the hearings in the county court and in this court. She is now 35 years old and has since 1964 been intermittently living with B, who is 38 and is the father of the child. He is engaged in some sort of motor car business. So far as the applicants are concerned, the male is 38 and the female 27. They both come from distinguished army families and he is an officer in a well-known cavalry regiment. They were married in September 1965, but have remained childless on account of some psycho-sexual impotence on the part of the husband, a condition which the learned judge considered would be unlikely to render their marriage unstable and should not be taken as a bar to the adoption.

I would interpolate here that, so far as it is relevant, it is plain on the evidence that, without going into detail, the prospects of the child as regards material, social and financial considerations and as regards the prospects of a stable home and surroundings would be immeasurably superior if he remains with the applicants to those which he would enjoy if he is returned to the mother with or without B. As

one small example of this, it is to be noted that since he was handed over to the applicants in September 1969, he has already been put down for Eton.

Returning to the mother, she had an unfortunate and unhappy childhood. She was born in 1934 while divorce proceedings were pending between her parents. She was abandoned by her mother some ten days after her birth. There was a settlement of about £14,000 made on her by her father and the co-respondent in the suit. That fund was principally administered by Mr Shaw, a solicitor, who was one of the trustees and acted as the mother's guardian. As a matter of history it would appear that that fund has by now been almost wholly expended, save for a sum of £500 put by for use in the event of the mother being able to take divorce proceedings and a final sum of £1,000 due to be paid to her on her fortieth birthday. In June 1954, she married a man called A whom she had met when they were both employed in a London store. By him she had two children, a boy born in 1956 and a girl born in 1958. That marriage obviously deteriorated for by late 1963 or early 1964 the mother was living with B at a cottage in W. In January 1965, the mother applied for the custody of the two children, but it was awarded to their father, A, possibly because she was living in adultery with B.

I come now to the remarkable matrimonial or extra-matrimonial career of B. He had married in 1955 and there was issue of that marriage one child, the paternity of whom B disputed. During that marriage, in 1957, he had a child by a woman called G, reputed to be an American millionairess. In March 1962 his wife divorced him. In July 1962, he married G, but within 18 months was associating with the mother. And—to anticipate for a moment—in 1966 G divorced him. In March 1964, the mother found herself pregnant by B. Whereupon B left her and resumed cohabitation with G, his then wife, with a view to a reconciliation, but after some three months returned to the mother, with whom he intermittently remained until May 1969. In December 1964, the mother gave birth to a stillborn child. In 1966 the mother underwent a serious surgical operation to deal with a blocked fallopian tube, and there is little doubt that, as the judge found, her object in so doing was to enable her to have a child by B and so, as far as possible, to cement their union. By the summer or early autumn of 1968 the mother must have become pregnant with the child with which we are presently concerned. Shortly after that B, as he had done on the occasion of her previous pregnancy, went off and lived with another woman, whose name we were not told, and then after three months returned to the mother. But by March 1969 he was associating with a young woman of 22 years of age called H, although he continued to live with the mother until May when he set up house with H.

On 5th April 1969 this child was born. Very shortly after his birth he suffered from serious cyanotic attacks and was on two occasions in hospital for a fortnight or so. The mother was apparently told by the doctors that as a result of those attacks the child might have suffered serious brain damage, a view which in the event has happily proved unfounded. In May or June 1969 the mother got in touch with Mr Shaw, her solicitor and trustee, and told him that she wished the child to be adopted, and as a result Mr Shaw later told her that he had found suitable adopters; they were the applicants. On 4th July, after an interview with a welfare officer, the mother informed Mr Shaw, through his secretary, that she had definitely decided on adoption. On 13th August she took a job in London, having arranged for the child to be looked after, at first daily by one local woman and later weekly by another. On 10th September, the child was handed over to the applicants, and on 1st October the mother let her cottage at W for 12 months, having taken a flat in London.

Going back a little in time, on 15th September the mother had received a sum of £2,500 from her trust on her thirty-fifth birthday. Whether the next event had

any connection with that, one does not know. But in October, H whom B had been proposing to marry having gone abroad on holiday, B promptly returned to the mother and the two of them had a reconciliatory weekend and exchanged expensive presents. On 30th October, the mother informed Mr Shaw that she had changed her mind about the adoption and wanted the child to be returned to her. At Mr Shaw's insistence she put this instruction in writing, namely in her letter of 31st October. But H returned to this country, heard of the reconciliation between B and the mother and attempted or pretended to attempt to commit suicide, whereupon B promised to marry her. Having learnt of this, the mother on 7th November telephoned Mr Shaw's secretary to say that she had changed her mind again about the adoption and wished it to proceed; but within half-an-hour she telephoned again to say that she did not wish the adoption to proceed; and that has remained her attitude ever since. The following weekend she spent with Mr Shaw's secretary, and her attitude then was that, whether B returned to her or not, she wished to keep the child and that if necessary she would take a domestic job where she could look after him.

To complete the dates. On 10th November, B married H and on 11th November took a house at C where H joined him. But their marriage was unsuccessful. Within a matter of days B was seeing the mother again. H remained with B in the house at C until February 1970. When she left, the mother rejoined B there.

I turn now to consider the law, but would make certain preliminary observations. In the first place, it is to be pointed out that WINN LJ in the course of his judgment, which he wrote before his unfortunate illness, and with which I respectfully agree, has not only dealt with the authorities which were cited to us but has also considered the corresponding provisions of the earlier Acts, i.e. the Adoption of Children Act 1926 and the Adoption Act 1950. This will enable me to deal with the authorities more briefly than one might otherwise have done and also, as far as the statute law is concerned, to confine my observations to the section which applies in the present case, i.e. s 5 of the 1958 Act. Secondly, it is to be pointed out that the decision which has perhaps caused us the most anxious concern is the recent decision of this court, composed of RUSSELL, SACHS and CROSS LJ, in *Re W (an infant)* (1). That case is the subject of an appeal to the House of Lords. The appeal has not yet been heard, and we accordingly find ourselves in the somewhat embarrassing position of having to give our reasons for our decision in the present case without having the benefit of their Lordships' views on the subject. The material part of s 5 of the 1958 Act provides:

'(1) The court may dispense with any consent required by paragraph (a) of subsection (1) of section four of this Act if it is satisfied that the person whose consent is to be dispensed with—(a) has abandoned, neglected or persistently ill-treated the infant; or (b) cannot be found or is incapable of giving his consent or is withholding his consent unreasonably.

'(2) If the court is satisfied that any person whose consent is required by the said paragraph (a) has persistently failed without reasonable cause to discharge the obligations of a parent or guardian of the infant, the court may dispense with his consent whether or not it is satisfied of the matters mentioned in subsection (1) of this section.'

It seems to me that the section draws a clear distinction between the cases covered by sub-ss (1) (a) and (2) on the one hand and those covered by sub-s (1) (b) on the other. The former are examples of misconduct towards the child; the latter are not, save insofar as it could be said to be misconduct unreasonably to withhold consent. If a person cannot be found, he could not in the ordinary case be said to be guilty of misconduct or, to use the word adopted by SACHS LJ in *Re W* (1), to be culpable on that

(1) p. 42 ante.

account, any more than would a person who is incapable of giving his consent. And I for my part can see no justification for colouring the third case covered by sub-s (1) (b), namely, the unreasonable withholding of consent, with any conceptions to be drawn from sub-s (1) (a) or (2) and not to be found in the first two cases covered by sub-s (1) (b). To put it in another way, the two subsections do not, in my judgment, deal with seven examples of improper but similar conduct, they do not constitute a genus, and the cases covered by sub-s (1) (b) are not in *pari materia* with the others. However difficult it may be in any individual case to decide whether the withholding of consent is unreasonable (even though, as is plain on the authorities and as was admitted in the present case by counsel for the mother, the test of reasonableness is an objective one), the problem is not rendered any easier by the substitution of some other and different word for 'unreasonably' or 'unreasonable'. Indeed, to do so served only to render the problem more difficult and to give the statute a meaning which its words do not bear.

The earliest of the cases to which we were referred was *Hitchcock v W B* (1), a case in the Divisional Court. There the seriousness of an adoption order was rightly emphasised and it was pointed out that whereas in custody and guardianship cases the welfare of the child is the paramount consideration, that is not so in adoption cases. Ane DEVLIN J contrasted the words of s 3 (1) (c) of the 1950 Act, which the court was there considering and which are similar in effect to those of the 1958 Act, with the provisions of s 2 (3) of the 1926 Act which enabled the court to dispense with any consent if satisfied that the person whose consent is to be dispensed with (*inter alia*)

'is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with'

thus obviously giving to the court a wide discretion.

Next in order comes the important and often quoted judgment of this court, given by JENKINS LJ in *Re K (an infant)*, *Rogers v Kuzmicz* (2). That was also a case under the 1950 Act. The important passage for present purposes is where JENKINS LJ said:

'It is, no doubt, true that s. 3 (1) (c) extends to the case of a parent and gives the court jurisdiction to dispense with the consent even of a parent who has not been guilty of any such misconduct or dereliction of duty towards the infant as is mentioned in s. 3 (1) (a), if satisfied that such parent's consent is unreasonably withheld. But we ask ourselves in what circumstances is a parent, not guilty of any such misconduct or dereliction of duty, to be held to have acted unreasonably in withholding his or her consent . . . One can imagine cases short of such misconduct or dereliction of duty as is mentioned in s. 3 (1) (a) in which a parent's withholding of consent to an adoption might properly be held to be unreasonable, but such cases must, in our view, be exceptional.'

This clear distinction between misconduct or dereliction of duty on the one hand and unreasonable withholding of consent on the other, when applied to the present case, shows that s 5 (1) (b) of the present Act deals with an entirely different state of affairs from that covered by s 5 (1) (a) and (2). It also, in my view, strongly suggests that in order to come within s 5 (1) (b) no element of misconduct, culpability or blameworthiness is necessary.

It is also to be noted that JENKINS LJ said:

'... the withholding of a parent's consent to an adoption order cannot be

(1) 116 JP 401; [1952] 2 All ER 119; [1952] 2 KB 561.

(2) 117 JP 9; [1952] 2 All ER 877; [1953] 1 QB 117.

held unreasonable merely because the order, if made, would conduce to the welfare of the child.'

I would underline the word 'merely' in this passage. For from nearly all the judgments in the decided cases it is apparent that one of the matters which should be taken into consideration is the welfare of the child. Perhaps it would be more accurate to say that one of the matters which a parent ought reasonably to take into consideration in deciding whether or not to withhold consent should be the prospects and outlook for the child if adopted as compared with those if unadopted; these prospects would include material and financial prospects, education, general surroundings, happiness, stability of the home and the like.

The next case in order of date was *Re L (an Infant)* (1) decided in July 1962, and referred to in the judgment of PEARSON LJ in *Re C (an infant)* (2). PEARSON LJ quoted the words of LORD DENNING MR in *Re L* where he said:

"But I must say that in considering whether she is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable; but still it may be unreasonable for her to withhold consent. We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case".

That test was adopted and applied by PEARSON LJ who himself added these words:

'I would think it right that it is primarily the welfare of the child that the mother should have in mind.'

That case was referred to in *A B and C B v X's Curator* (3), in which LORD SORN, while applying the test propounded by LORD DENNING MR, to some extent put a slight gloss on it in these words:

'... how would a parent, placed in the situation of the actual parent and having the qualities or the defects of the actual parent, yet considering the situation reasonably, have decided the question?'

It may perhaps be thought that to frame the question in this way is to introduce an element of subjectivity into what is admittedly an objective question.

Another case referred to by PEARSON LJ was *Re W (an infant)* (4) decided in July 1963. In that case there was some medical evidence of danger to the child in the event of the adoption order not being made. But the medical evidence there was, in the words of PEARSON LJ, weak and indecisive and the Court of Appeal reversed the order of the county court judge who had dispensed with the mother's consent. It is to be noted that of all the cases referred to before us *Re W (an infant)* (4) was the only one in which this court has, as it were, acted in the face of medical evidence to the effect that to return the child to its parent might have deleterious effects. And as will be seen later, the medical evidence in the present case is very strong indeed.

I turn now to *Re C* (2) itself. Nothing more need be said about the judgment of PEARSON LJ to which I have already referred. He applied the test laid down by LORD DENNING MR in *Re L* (1), and I respectfully agree with and would follow both of those

(1) (1962), 106 Sol Jo 611; The Times, 19th July.

(2) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(3) 1963, SC 124.

(4) (1963), unreported.



learned judges. But in *Re C* (1) DIPLOCK LJ propounded two tests which, if I may say so with the utmost respect, seem to me to be inconsistent with each other. He said:

'The question, indeed, that should be put I would put in these terms: Would a reasonable parent regard a refusal to permit the adoption of the child as involving a serious risk of affecting the whole future happiness of the child?'

With that test I wholeheartedly agree; but earlier DIPLOCK LJ had said that the question was:

'Does the withholding of the consent by the parent show a callous or self-indulgent indifference to the welfare of the child?'

That last passage had the greatest effect on Judge Pennant in the present case. Indeed I think that it is true to say that he directed himself according to it and that in substance his answer to that question formed the ratio of his judgment. But I confess that for myself I am unable to accept this test—in contradistinction to the other one propounded by DIPLOCK LJ—as valid. To speak of 'callous or self-indulgent indifference to the welfare of the child' is again, as I think, to introduce notions of misconduct or dereliction of duty which, as I have attempted to show, in my view form no part of the concept of unreasonableness under s 5 (1) (b) of the Act.

The most recent of the cases is *Re W (an infant)* (2), in which this court reversed a decision of the county court judge that consent was unreasonably withheld. That case is, as I have said earlier, under appeal to the House of Lords, so that it is not easy for us today to comment on it in any detail. It is perhaps sufficient to say that in the course of a most careful and closely reasoned judgment—obviously designed to assist those in inferior courts who have to decide these most difficult questions—SACHS LJ stated that in his view in order to establish the unreasonableness of a refusal of consent there must be shown a high degree of culpability on the part of the parent. And he said that the order sought, i.e. an adoption order against the consent of the parent, 'has penal aspects'.

Of course my view about this matter may be completely wrong; but I can only repeat that which I have already said, namely that unreasonableness and culpability seem to me to be quite different things. What was said in *Re W* (2) is not in my opinion binding on this court. There was material in that case on which the court could come to the conclusion that consent was not being unreasonably withheld and consequently the general discussion as to the principles to be applied was obiter. The only other comment to be made about *Re W* (2) is that there was in that case no medical evidence as to the possibility or probability of injury to the child's health if the adoption order were not made. The court was prepared to treat it as axiomatic that the preponderance of modern medical opinion is to the effect that such danger exists. But that assumption does not go nearly so far as did the reports and the oral evidence of the three doctors in the present case. The substance of their evidence is set out by the learned judge in his judgment and it is unnecessary to repeat it. I would only refer to one answer given by Sir Wilfrid Sheldon dealing with a special danger over and above that inevitably inherent in the transfer back of a child of such tender years from adopted parents—the only parents whom he has ever consciously known—to a natural parent whom he does not know. Sir Wilfrid was asked:

'What then would you expect if you had first of all a stable home—and there I am including stable parents and home—and transfer to an unstable one?'

and his answer was 'Disaster'.

(1) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(2) p. 42 ante.

How then is the question in this case to be resolved? On the mother's side there is, of course, the tie of blood and natural love and affection, although it is to be remembered that even before the child was handed over her association with him was to some extent interrupted. Perhaps more importantly operating in her mind is the hope that if she recovers the child that may help to cement her union with B for the sake of which she originally conceived and bore the child. But even to the mother who, it would seem, is completely obsessed with him, B must present an almost insoluble problem. The judge, who saw and heard them both, thought that the union was unlikely to be permanent and, in the light of her past experiences of him, the mother cannot fail to realise that he is hopelessly unreliable and could be off again at any moment. If he does stay, he is obviously, although the natural father, not the sort of man who would be a good example to a growing boy, even if it became somehow possible in the future for him and the mother to marry each other. If, as is not unlikely, he goes off again, then there will be no male influence, good or bad, in the mother's household. And how can anyone, even the mother herself, be sure what her reaction would be in that event? It is true that in November 1969, her attitude was that she wanted the child with or without B. But if he were to go off again, it is obviously not impossible that the emotional shock to the mother might cause her once more to wish to have the child adopted. In short, the home and family to which the mother seeks to have the child returned is without question fragile and unstable.

It is suggested that it is reasonable for the mother to have regard to the incapacity, such as it is, of the male applicant. But the judge regarded that in this context as a minor matter, as it obviously was, and I do not consider that it would be reasonable for her to attach any weight to it. Contrariwise I do not think that it would really be reasonable for the mother to take into consideration the effect of her decision on the applicants or the criticisms made in the evidence of her as a housekeeper or as to her suggested financial irresponsibility, which criticisms she could not be expected to regard as valid.

What have the applicants to offer which makes it unreasonable for the mother to withhold her consent? In the first place, as counsel for the mother admitted during the argument, an ideal home in the circumstances and surroundings such as the mother could never hope to provide, with every prospect of a happy and normal life in sound and stable conditions. To that must be added in this case the medical evidence, which is, and in my view should be realised by the mother to be, almost overwhelming. She should not, if acting reasonably, expose the child to the dangers which the doctors envisage. The shock which it is suggested he might suffer at some future date if he should discover that he had been adopted is, in my view, but a small matter to put into the other side of the scale.

In the light of all the history of this matter, and the story of the mother's unhappy experiences with B, the advantages and prospects which the applicants have to offer and the medical evidence, I was at the end of the argument clearly of the opinion that the mother was acting unreasonably and was accordingly in favour of allowing the appeal.

**WINN LJ** (read by DAVIES LJ): A decision that a mother is permanently to be parted from her infant child is one of the gravest that a judge may ever take; natural diffidence combined with sympathy and repugnance from infliction of pain must impose stringent checks. No one would lightly or readily form the judgment which I myself feel compelled to express: that the mother has unreasonably withheld her consent to the proposed adoption.

It is perhaps a little curious that when Parliament made provision for adoption orders, by the Adoption of Children Act 1926, although it prohibited the making of

any such order except with the consent of every person or body who was a parent or guardian of or who had the actual custody of the infant or was liable to contribute to his support—very comprehensive categories—the court was given very wide powers of dispensation. The proviso to s 2 (4) of the Act merits quotation but it is convenient to break it up into separate portions, thus:

‘the court may dispense with any consent required by this subsection if satisfied that (i) the person whose consent is to be dispensed with or cannot be found, or (ii) is incapable of giving such consent, or (iii) that the spouses have separated and are living apart and that the separation is likely to be permanent.

Thus it is apparent that while that Act was in force the court had a discretionary power to make an adoption order notwithstanding the lack of consent of any person whose wishes or opinion the court thought ought to be ignored. No guidance was given by the main sub-section (s 2 (3)) to the considerations which would justify or require a judgment discarding any person’s opinion. A minor provision in s 10 of the 1926 Act empowered the court to confirm existing *de facto* adoptions, of two years’ standing, without requiring the consent of any parent or guardian; in such a case a requirement was imposed that the court should be

‘satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the infant that no such consent should be required and that an adoption order should be made.’

It seems justifiable to comment that the combined effect of the two sections is to indicate that while the welfare of the infant was regarded by Parliament as not irrelevant the provisions enacted were calculated primarily to preserve the right of any person who had begotten or borne or duly supported and cared for the infant to pronounce a veto on his adoption which the court could only ignore or override for reasons sufficient to support an exercise of judicial discretion and where justice and equity required this course.

In 1950 a consolidating Act called the Adoption Act 1950 was passed which provided, *inter alia*, by s 2 (4), that subject to the provisions of s 3 of the Act an adoption order should not be made

‘except with the consent of every person or body who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant . . .’

Section 3 (1) of the Act enabled the court to dispense with any consent so required if satisfied—

‘(a) in the case of a parent or guardian of the infant, that he has abandoned, neglected or persistently ill-treated the infant; (b) in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the infant, that he has persistently neglected or refused so to contribute; (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld.’

On these statutory provisions it may be commented that they provide for disqualification of objections of parents or guardians who have failed to perform or have abused their parental functions or of financial supporters of an infant who have failed to maintain such support, and that apart altogether from those two categories of persons whose wishes may be overridden, three other special cases are contemplated—(i) inability to find a person whose consent is *prima facie* required to be obtained; (ii) the incapacity of such a person, presumably by reason of mental frailty, to give

or withhold an intelligent consent; and (iii) a refusal by such a person to give consent which is unreasonable. The difficult question is, of course, left open: When is it unreasonable to withhold consent?

In passing it is, perhaps, of some slight interest to note that both the 1926 Act, s 2 (4), and the 1950 Act, s 3 (2), provided that although one spouse should not be allowed to adopt any infant without the consent of the other spouse, the court might dispense with such consent if satisfied, *inter alia*, that the spouses had separated and their separation was likely to be permanent, presumably because it could not then be particularly material whether the absent spouse would or would not welcome the arrival of an adopted child into the matrimonial home.

In the Adoption Act 1958 the relevant provisions follow a similar but more succinct form. Section 4 provides that an adoption order shall not be made except with the consent of every person who is a parent or guardian of the infant save to the extent permitted by s 5. The latter section empowers the court to dispense with any such consent

'if it is satisfied that the person whose consent is to be dispensed with—  
(a) has abandoned, neglected or persistently ill-treated the infant; or (b) cannot be found or is incapable of giving his consent or is withholding his consent unreasonably.'

It is to be observed that the former references to persons who had undertaken an obligation to support the infant have been omitted and now it is only the consent of parents which is required and in relation to which the dispensing power of the court may have to be exercised. There is an additional ground set out in s 5 (2), imported from the Children Act 1958, enabling the court to dispense with the consent of any parent or guardian who has failed without reasonable cause to discharge his obligations as parent or guardian to the infant.

It cannot be doubted that s 5 (2) and s 5 (1) (a) are aimed at parents who have forfeited the rights and privileges in relation to their child which would otherwise have been inherent in their parenthood; on the other hand, s 5 (1) (b) does not, as I see the matter, relate to any form of misconduct in the capacity of parent or otherwise, or to any behaviour or defect to which any pejorative epithet or any form of condemnation could properly be applied. It simply refers to three situations which are the same as those contemplated by and legislated for in the 1950 Act, s 3 (1) (a) and (c).

I have stressed the apparent absence of any indication of blame from the wording of s 5 (1) (b) of the Act—unless, of course, blame is to be considered to be imputed by the adverb 'unreasonably'—because I have in mind certain judicial observations to which it will be necessary to refer. Leaving aside for the moment the possible implications of this word 'unreasonably' it can, I think, be accepted that the mere fact that a person cannot be found is not normally indicative of his being at fault, in any respect whether in relationship to some infant or in any other respect; of course, many persons who cannot be found have deliberately gone into hiding and if they are hiding are probably guilty in some respect, but it does not follow that this is why they are missing. Equally it must be conceded that many people become incapable of intelligently choosing whether to give or withhold consent for physical reasons for which they cannot be held responsible. Accordingly it does not seem to me that the subject-matter of the subsection comprises any genus by reference to which any implication can be raised that the final phrase 'is withholding his consent unreasonably' should be expected to import any misconduct or blameworthiness. If and insofar as it is legitimate at all to draw from the scope of the subsection any inference of intention that all persons to whom it applies should have something in

common with one another, I cannot myself envisage any possible common element other than, perhaps, a concept of unavailability for the court of any useful guide whenever it has to deal with a factual situation where no consent of a parent of an infant is forthcoming to satisfy the primary requirement of the Act. Plainly if the parent cannot be found or is mentally defective there will be such an absence of consent; may it be legitimate to regard the concluding words of the subsection as contemplating any case in which, albeit there is a refusal of consent, that refusal can be treated judicially as nugatory because it has been asserted without any reasonable basis?

The word 'reasonable' or its correlative 'unreasonable' and the corresponding adverbs are in common parlance in the law courts, constantly used, almost as often misused, and forced into the service of many arguments into which they fit with varying and often slight appropriateness. A broad division can be recognised between the use of 'reasonable' as a measure of the standard of conduct or foresight of the hypothetical normal citizen or of what he is entitled to receive by due process of law, and, on the other hand, of the rational or irrational character of a decision. In this context the test is probably more accurately stated thus: was the decision in question one to which no reasonable man, woman, jury or bench of magistrates could have come? Should the answer to the question so posed be negative then the court will have no more regard to the decision in question than it would have had to a complete disagreement or an intimation of inability to form any decision.

I am on the whole disposed to think that it may be legitimate or at any rate may tend to favour a fair and just decision in cases where the issue is that which is raised in the instant case, ie was the parent's consent to the adoption of the infant unreasonably withheld, to adopt and apply the extremely strict test discussed in the preceding paragraph. Thus one would ask oneself in all the circumstances of the particular case and having regard to the experiences of the particular mother, her interests and her rights so far as they are legitimate, is it right for the court to say that it has been established against her that no such mother so situated could, acting reasonably, have refused her consent? In such a statement of the problem the adverb 'reasonably' must mean applying a rational and not unduly prejudiced mind to the relevant considerations, including in particular those directly affecting the infant.

There are certain authorities which bear in a relevant sense on the meaning and proper application of the Act of 1958 and the earlier Act, but before considering these I feel bound to say that a study of them has not made me feel able to accept as authoritative guidance either the observations of DIPLOCK LJ about 'self-indulgence' or those of SACHS LJ about 'culpable conduct' in two of the more recent cases to which I shall make reference.

The leading authority on the topic of withdrawal of the consent of a parent, decided on the provisions of the 1950 Act, is *Re K (an infant)*, *Rogers v Kuzmicz* (1). It was there held that while each case must depend on its own facts and circumstances the withholding of consent could not be held to be unreasonable merely because the adoption proposed would conduce to the welfare of the infant, nor was it important that a written consent had originally been given and then withdrawn nor that the child had been fostered for a period. JENKINS LJ, giving the judgment of the court, said:

'we ask ourselves in what circumstances is a parent, not guilty of any such misconduct [ie such as is mentioned in s 3 (1) (a)] or dereliction of duty, to be held to have acted unreasonably in withholding his or her consent to an order the effect of which, if made, will be to extinguish once and for all his or her parental rights, duties and obligations in regard to the infant, and, indeed, the very

(1) 117 JP 9; [1952] 2 All ER 877; [1953] 1 QB 117.

relationship between them of parent and child, and to make the infant thenceforth the child of the adopters in substitution for, and to the utter exclusion of, its natural parents? Prima facie it would seem to me eminently reasonable for any parent to withhold his or her consent to an order thus completely and irrevocably destroying the parental relationship. One can imagine cases short of such misconduct or dereliction of duty as is mentioned in s. 3 (1) (a) in which a parent's withholding of consent to an adoption might properly be held to be unreasonable, but such cases must, in our view, be exceptional.'

In the course of this judgment reference was made with approval to *Hitchcock v W B* (1) in which a Divisional Court held that there was no ground for saying that it was unreasonable of a man to refuse his consent to the adoption of his child if he was found to be working satisfactorily so as to have means to contribute to its maintenance and had an honest desire to remain the parent.

In 1964 there was a decision on the Adoption Act 1958, *Re C (an infant)* (2). It related to an illegitimate child born in October 1961, who was fostered with the applicants in February 1962 by the children's officer with a view to their adopting the child, they being in every respect suitable adopters; the father of the child consented to the proposed adoption. After hesitation, the mother gave oral consent, in June 1962, to the proposed adoption but never gave any written consent, and constantly vacillated about the step until August 1963, when she signed a consent form. In September she withdrew her consent although she had no certain plans for the future of the child. Evidence was given by a consultant pediatrician that if the child were taken away from the applicants there would be a serious risk of severe psychological damage to the child; the judge adjourned the hearing to allow the mother to consider this evidence, but she declined to accept its validity. The judge held, primarily by reason of the medical evidence but having regard to all the circumstances, that she had acted unreasonably in withholding her consent and it was held on appeal that for the same reasons the judge's order should be upheld. PEARSON LJ said:

'We are not concerned in cases of this kind, where the question is simply whether the mother's consent is being unreasonably withheld, with, in itself, the question which course would be in the best interests of the child. It is not enough to show—indeed, it is not strictly a relevant consideration by itself—that, in the interests of the child, it would be better that the child should remain with the foster-parents, or that the child should be taken by the mother. What is relevant is the mother's attitude to questions concerning the welfare of the child.'

Later he commented:

'It is a salient feature of this case that it is the first case in which the mother's attitude to the probable effect on the child of a change of parentage has been made the crucial ground of decision.'

In an important quotation from the judgment of LORD DENNING MR in *Re L (An infant)* (3), which at the time was reported only in *The Times* of 19th July 1962 PEARSON LJ quoted LORD DENNING MR, who said:

'"I quite agree that . . . (iii) the one question is whether she is unreasonably withholding her consent. But I must say that in considering whether she is

(1) 116 JP 401; [1952] 2 All ER 119; [1952] 2 KB 561.

(2) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(3) (1962), 106 Sol Jo 611; *The Times*, 19th July.



reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable; but still it may be unreasonable for her to withhold consent. We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case".

PEARSON LJ added:

'I would think it right that it is primarily the welfare of the child that the mother should have in mind; but, of course, it is also relevant to consider the effect of her decision on other persons—on herself, on the adoptive parents . . . and on any other person concerned . . .'

Having considered *Re W (an infant)* (1), PEARSON LJ stressed that in that case the medical evidence was that a change of care for the infant was not likely to do him any lasting harm of a serious character, and that ORMEROD LJ in giving judgment had said:

"Having regard to the medical report, it seems to me that it would be extremely difficult on that evidence to say that the mother's conduct in refusing consent was unreasonable."

He also stressed that it was very important to know that the medical evidence in that case had not carried the matter any further than to show a risk which any reasonable mother might take, whereas in *Re C* (2) it was his opinion that there was strong uncontradicted evidence from the doctor that there would probably be a serious effect on the child. PEARSON LJ further stated:

' . . . in a case such as this, when the medical evidence was so strong, was uncontradicted and was accepted by the learned judge, this court could not properly interfere if his decision were based solely on the first [ie medical] ground.'

In the same case, *Re C*, DIPLOCK LJ said:

'It is clear law that the mere fact that the court is satisfied that the order would be for the welfare of the child in the materialistic sense is not sufficient to allow the court to dispense with consent . . . The relevant consideration in deciding whether a parent is withholding consent unreasonably is the conduct of the parent . . . of the child; but it is the conduct of the parent as a parent towards the child. This seems to me to be apparent from the various specific grounds on which parental consent can be dispensed with . . . namely [then he set out the section and continued:] Apart from incapacity, each of these specific grounds is an example of the parent having shown a callous or self-indulgent indifference to the welfare of the child, using "welfare" in the broad sense and not that of mere material advantages, a sense in which it is so often used.'

DIPLOCK LJ then added a gloss on the statutory criteria which strikes me as most interesting, but, I add respectfully, one for which there is no apparent support in authority or from construction of the statute. He said:

'In considering whether the consent is being unreasonably withheld a similar test, in my view, has to be applied: Does the withholding of the consent by the

(1) (1963), unreported.

(2) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

parent show a callous or self-indulgent indifference to the welfare of the child? Let me hasten to say that, in this case, no question of callous indifference arises; it is one of self-indulgent indifference, in my view.'

For my own part I venture to think that whilst it may be very relevant and, indeed, necessary, to consider whether the natural parent has shown indifference to the welfare of the child, I find it difficult to accept that there is any scope for the application of the additional tests of callousness or of self-indulgence in judging any refusal of consent. The true test is that stated by DIPLOCK LJ, I respectfully think, with perfect precision in these terms:

'The question, indeed, that should be put I would put in these terms: Would a reasonable parent regard a refusal to permit the adoption of the child as involving a serious risk of affecting the whole future happiness of the child?'

A comparable gloss on the Act was suggested by SACHS LJ in a very recent case which we are told is now the subject of an appeal to the House of Lords, *Re W (an infant)* (1), in which another Division of this court gave judgment on 13th May 1970. He is reported as having said:

'What is the nature and degree of conduct which may deprive a mother of her right to be a parent? By whose standards does one judge what is reasonable? That such conduct must be culpable is, of course, clear from the analysis of the relevant provisions of the 1950 Act by JENKINS LJ in *Re K* (2), his reference to the need to establish something not far short of the highly culpable offences referred to in s 5 (1) (a) of the 1958 Act, and the view expressed that the cases in which it can be held established must be "exceptional". After a similar analysis DIPLOCK LJ in *Re C (an infant)* (3), used the phrase "callous or self-indulgent indifference" to define the test. In short the degree of culpability to be established is high—as one would expect when an order is sought that has penal aspects.'

Later in his judgment SACHS LJ said:

'That protection can be destroyed by clearly establishing the mother to be guilty of conduct culpable to quite a high degree . . . The following factors cannot be taken as showing culpable disregard by a mother of her child's welfare . . .'

I feel constrained diffidently to express my dissent from any suggestion that it is necessary to show that the refusal of a parent to consent to the adoption of his or her child involves any culpable conduct on the part of that parent in order to establish that such refusal was unreasonable; in my own quite definite opinion a parent may be entirely free from blame and in no respect culpable nor justifiably to be reproached in refusing consent to an adoption and yet it may in the judgment of the court be quite unreasonable to refuse such consent. It follows that I cannot associate myself with the observations of CROSS LJ in that case where he is reported as having said:

'all these considerations lead me to think that the section envisages a degree and standard of unreasonableness which although not amounting to positive misconduct with regard to the child does not fall far short of it . . . "shutting your eyes to a blameworthy degree to the very serious consequences which your refusal of consent will almost certainly entail for your child".'

(1) p. 42 ante.

(2) 117 JP 9; [1952] 2 All ER 877; [1953] 1 QB 117.

(3) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

I do not myself think that the section either imposes or contemplates the existence of a duty owed to the child to be reasonable nor can I at all clearly envisage the concept of a duty of reasonableness as distinct from a standard of conduct conforming with reasonableness. I do, of course, recognise that such impressions as to the underlying implications or connotations of statutory provisions are very much a matter of personal impression, and it is not my intention in the slightest degree to suggest that those impressions expressed by DIPLOCK, SACHS or CROSS LJ are wrong, or that any comparable impression of my own is right, but merely to state that I am not myself able to adopt any of the criteria of culpability or carelessness as an appropriate guide to the solution of the extremely difficult question which the instant case poses, ie should this court hold that the learned county court judge after a careful and patient investigation was wrong in refusing to find that the refusal of consent by the mother was unreasonable? I have already indicated that I personally am convinced that it was unreasonable for her to have refused consent to the adoption of the child. My main reason for having formed this opinion is that I cannot accept it as possible that a woman in her position having had the experiences that she has had could reasonably have contemplated any future for the child consistent with his happiness and safety if she was determined, as she said that she was, to continue to associate intimately with the man with whom she was living at the time of the hearing, one B.

I cannot regard the mother's refusal to consent as reasonable or consistent with any assessment that any reasonable mother could make of the implications for her infant child of that refusal, which would inevitably involve, if upheld, his remaining with her to share her future vicissitudes with B. I say nothing about the issue rather tentatively raised about the fitness of the male applicant to provide a contented household; it was not a real anxiety to anyone. Although I feel great sympathy for the mother and regard her frailty of judgment as a matter for sympathetic understanding and not as a misdemeanour, I feel constrained to say that the court ought to set aside her refusal and make an adoption order in favour of the applicants.

**KARMINSKI LJ:** I have had the advantage of reading the judgment of DAVIES and of WINN LJ, and am in entire agreement with both their conclusions and reasons. But as this appeal is of great importance to the parties and also to the general public, I shall add a few observations of my own.

Some difficulty has been caused in earlier decisions under s 5 (6) of the Adoption Act 1958 in ascertaining the meaning of the word 'unreasonably'. For example in his judgment in *Re W (an infant)* (1) SACHS LJ repeatedly used the word 'culpability' as being an essential element of unreasonableness. CROSS LJ thought that the section envisages a degree of unreasonableness not falling far short of positive misconduct, and talked of shutting the parental eye to a blameworthy degree to the very serious circumstances to which she was exposing the child. In the earlier case, *Re C (an infant)* (2) under this section, DIPLOCK LJ suggested the test of callous or self-indulgent indifference to the welfare of the child. In the same case PEARSON LJ referred to the very great emotional difficulties which a natural mother must face in coming to a decision on giving or refusing her consent to the adoption of her child, giving proper weight to the welfare of her child, as well as her own strong maternal feelings.

For myself I appreciate the very real emotional difficulties which a mother must face in deciding whether to keep the child herself, or to consent to his adoption and to part with the child for ever. It cannot be easy for a mother to consider the matter reasonably in the sense that that word is used in consent to some conveyancing or

(1) p. 42 ante.

(2) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

commercial transaction. But the Adoption Act 1958 used the word 'unreasonably', and a mother must try to be as reasonable as a mother can be when deciding to give up or to keep her own child.

With very real respect to eminent judges who have thought otherwise, I think that it is wrong to import into the section the test of culpability or misconduct or callous or self-indulgent indifference. In my view the question is whether on the facts of this particular case, the mother's consent was unreasonably withheld. DAVIES and WINN LJ have set out the mother's history, and in particular that part which deals with her association with B. Even if it continues for some time, that association seems to me to be at least very unlikely to provide a stable background for the child. Nothing has been said by way of criticism of the characters or circumstances of the applicants, who on the evidence before us can at least provide a stable and comfortable background for the child.

I agree that the refusal of the mother should be set aside and that an adoption order should be made in favour of the would-be adopters.

*Appeal allowed*

Solicitors: Joynson-Hicks & Co; Ellis, Wood, Bickersteth & Hazel.

H.S.

NOTE: In both this case and the preceding case *Re B (an infant)* (p 59 ante) leave has been granted to appeal to the House of Lords.

#### QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, JAMES AND COOKE, JJ)

7th July 1970

R v BIRMINGHAM CITY JUSTICES. Ex parte CHRIS FOREIGN FOODS (WHOLESALE) LTD

*Magistrates—Natural justice—Magistrate acting in administrative or executive capacity—Duty to act openly, impartially and fairly—Seizure of sweet potatoes by local authority officer—Meeting between justice and local government officials before hearing—Box of sweet potatoes shown and sample cut open—Retirement at end of hearing of magistrate with public analyst and chief veterinary officer—Advice received, but not communicated to defendants—Food and Drugs Act, 1955, s 9 (3)—Colouring Matter in Food Regulations, 1966, reg 5 (1).*

A magistrate, even when not acting as a court of summary jurisdiction, but only in an administrative or executive capacity, is still under a duty to act openly, impartially and fairly.

By reg 5 (1) of the Colouring Matter in Food Regulations, 1966: 'no . . . vegetable, in a raw or unprocessed state . . . imported into England for human consumption, shall have in it or on it . . . any added colouring matter.'

The applicants imported a quantity of sweet potatoes from Gambia. After being lifted in Gambia, the potatoes were sun dried, which bleached them, and the applicants added colouring matter to restore their pink colour. They were seized by an officer of the local authority under s 9 (1) of the Food and Drugs Act, 1955, and brought before a magistrate under s 9 (2). On 19th March 1970 the magistrate attended at the offices of the public health department and there met the senior food inspector and a colleague and the chief veterinary officer. He was shown a box of the potatoes and a sample was cut open, which (as the magistrate subsequently stated in an affidavit) appeared to be raw, and he was shown the public analyst's certificate which stated that the potatoes appeared to be unprocessed. The hearing of proceedings for the condemnation and destruction of the potatoes as unfit for human consumption in that, when in a raw or unprocessed state, they had in them colouring matter, contrary to reg 5 (1) of the Colouring Matter in Food Regulations, 1966, was adjourned till 2nd April, notice having been given to the applicants.

On that day the local authority did not call any evidence, but the applicants, who clearly knew the point at issue, made submissions and called evidence. At the conclusion of the applicant's case the magistrate retired together with the public analyst and the chief veterinary officer, saying that he wished to take advice from them. Some minutes later all three returned and the magistrate said that he upheld the public analyst's certificate, and that he found the sweet potatoes unprocessed and accordingly unfit for human consumption. On an application for certiorari,

HELD: (i) the meeting of the magistrate on 19th March with the chief veterinary officer, the public analyst, and public officials did not amount to unfairness or denial of natural justice, even though the sample had been inspected in the absence of the applicants; (ii) there was no unfairness arising from the fact that the officials did not give evidence at the hearing, since the applicants clearly knew the point which they had to meet; (iii) there was a breach of the rules of natural justice when, after the magistrate had retired with the two officials to take advice, all three returned into court just before he announced his decision, since he did not inform the applicants of the advice which he had received or allow them to deal with it; further, s 9 (3) of the Act of 1955 gave jurisdiction to the magistrate alone, not to him together with the chief analyst and any other person, and on this last ground certiorari must issue to quash the orders made by the magistrate for condemnation and destruction of the potatoes.

MOTION by the applicants, Chris Foreign Foods (Wholesalers), Ltd, for an order of certiorari to bring up and quash four orders made by a justice of the peace for the city of Birmingham whereby he condemned 280 cases of sweet potatoes, the property of the applicants, and ordered that they be destroyed as unfit for human consumption under s 5 (1) of the Colouring Matter in Food Regulations 1966.

*K S Rokison* for the applicants.

*A F B Scrivener* for the respondents.

**LORD PARKER CJ:** In these proceedings counsel for the applicants moves for an order of certiorari to bring up and quash four orders made by Leslie George Seymour, a justice of the peace for the city of Birmingham (hereinafter referred to as 'the justice') on 2nd April 1970, whereby, pursuant to s 9 of the Food and Drugs Act 1955, he ordered that parcels of sweet potatoes amounting in all to 280 cases, the property of the applicants, should be condemned and destroyed as unfit for human consumption in that they contravened reg 5 (1) of the Colouring Matter in Food Regulations 1966.

Before coming to the facts of the case, it is convenient to remind oneself of the legislation. Section 9 of the Food and Drugs Act 1955 provides for the examination and seizure of suspect food. It provides:

'(1) An authorised officer of a council may at all reasonable times examine any food intended for human consumption which has been sold, or is offered or exposed for sale, or is in the possession of, or has been deposited with or consigned to, any person for the purpose of sale or of preparation for sale, and, if it appears to him to be unfit for human consumption, may seize it and remove it in order to have it dealt with by a justice of the peace.

'(2) An officer who seizes any food under the foregoing subsection shall inform the person in whose possession the food was found of his intention to have it dealt with by a justice of the peace, and any person who under section eight of this Act might be liable to a prosecution in respect of the food shall, if he attends before the justice upon the application for its condemnation, be entitled to be heard and to call witnesses.

'(3) If it appears to a justice of the peace that any food brought before him, whether seized under the provisions of this section or not, is unfit for human

consumption, he shall condemn it and order it to be destroyed or to be so disposed of as to prevent it from being used for human consumption.'

The ground on which it is said that these potatoes were not fit for human consumption was by reason of an addition of colouring matter. Regulations were made in 1966 entitled the Colouring Matter in Food Regulations 1966, and by reg 5 (1) it was provided:

'no . . . vegetable, in a raw or unprocessed state, sold, consigned, delivered or imported into England and Wales for human consumption, shall have in it or on it (otherwise than for the purpose of marking) any added colouring matter . . .'

In fact the vegetables in the present case were sweet potatoes from Gambia, which undoubtedly did have colouring matter, and the sole issue which would determine whether they were fit or unfit for human consumption was whether they were in a raw or unprocessed state; if they were, they were liable to be condemned.

With that introduction it appears in the present case that the applicants, as their name shows, are importers of foreign foods, amongst other things sweet potatoes. Apparently sweet potatoes had until recently come solely from the Canary Islands, but of recent times they have been imported from Gambia. The Gambia sweet potatoes are pink in colour, but when lifted in Gambia they are sun dried, which bleaches the colour out of them, and in order to restore the pink colour, colouring matter is added.

These parcels of goods were perfectly fit for human consumption save in regard to this one matter, ie whether colouring matter had been added to them in either their raw or unprocessed state. What happened here, quite shortly, was that these parcels were seized by the local authority officer, and were brought before the justice. They were brought before him on 19th March, when he attended at the offices of the public health department and met the senior food inspector and his colleague, and the chief veterinary officer. He was on that occasion shown a box of these potatoes, a sample was cut open, and as the justice in his affidavit in this case says, it appeared to be raw. In addition he was then shown the public analyst's certificate which stated that the potatoes 'appeared' to be unprocessed. Quite properly notice was given to the applicants, who desired to call evidence, and the hearing was adjourned until 2nd April. On 2nd April a hearing took place at which no evidence was called by the local authority, but the applicants, who clearly knew the point at issue, appeared, made submissions, and called evidence to show that the potatoes were not raw or unprocessed. During the course of that hearing it is said that the justice refused to look at certain photographs which were being adduced by the applicants in support of their submissions, and also declined to look at any sample. Of course, the applicants did not know that he had in fact seen a sample and had one cut open, but at any rate he declined to look at the sample at the hearing.

Finally, this occurred, and, in my judgment, this is the real question in the case. According to Mr Medhurst, the articled clerk of the solicitors appearing for the applicants, in para 14 of his affidavit he states:

'The case on behalf of the applicants herein having been concluded, the justice of the peace rose and retired from the room together with the public analyst, Mr. Coombs, and the chief veterinary officer, Mr. Wilson, saying that he wished to "take advice" from them. Counsel on behalf of the applicants herein protested but his protest was ignored. The justice of the peace, the public analyst, and the chief veterinary officer returned some minutes later, and the justice of the peace said that he upheld the public analyst's certificate, that the sweet potatoes in question did appear to be unprocessed, and that, accordingly, they were unfit for human consumption.'



The justice, in his affidavit, again para 14, states:

'After counsel had called all his evidence and concluded his argument I left the room with Mr. Coombs and Mr. Wilson. I then read the relevant passage in the Act itself and asked both these gentlemen for further assistance and both explained why they both thought the potatoes were unprocessed. I then returned to the room and I announced that I considered the processing I had heard about, namely (1) washing in warm water to remove the dirt, etc., and (2) drying by natural sunlight, did not result in a substantial change in the natural state of the potatoes and therefore I accepted the analyst's certificate.'

Much argument has been adduced in this present case as to the exact position of the justice under this procedure. Was his a judicial function? Was it a judicial inquiry? Was it a quasi-judicial inquiry? Was he an administrator acting as the result of a judicial inquiry? Was he throughout an administrator? What position was he in?

For my part I find it quite unnecessary to come to any decision in the matter, any more than I did in a case concerning immigrants, *Re K (H) (an infant)* (1). That concerned the position of immigration officers, and again considerable argument was adduced as to the exact position of the immigration officers. Having referred to another case, I said:

'This, as it seems to me, is a very different case, and I doubt whether it can be said that the immigration authorities are acting in a judicial or quasi-judicial capacity as those terms are generally understood. At the same time, however, I myself think that even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but of acting fairly, and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.'

That, as I understand it, has been approved on more than one occasion in the Court of Appeal.

I approach it in that manner because the court has been referred, among other cases, to *R v Cornwall Quarter Sessions Appeal Committee, ex parte Kerley* (2), where this court held that a justice to whom a sanitary inspector had referred a matter under legislation then in force for condemnation, was not a court of summary jurisdiction, so that there was no appeal to quarter sessions, and quarter sessions were prohibited from dealing with the applicant's appeal; that was the ratio of that decision. Quite clearly, as was pointed out in that case, the justice in a case such as this is not acting as a court of summary jurisdiction, there is no information preferred; there is no complaint preferred; he is clearly not acting as a court of summary jurisdiction. The court then went on in various terms to emphasise that he was really acting administratively as if he was the chief inspector confirming one of his underlings. But again *DONOVAN J* referred to the matter in the way in which I prefer to refer to it, when he said that even though he was acting in an administrative or executive capacity he, ie, the justice, had to bring qualities of impartiality and fairness to bear on the problem,

(1) [1967] 1 All ER 226; [1967] 2 QB 617.

(2) 120 JP 469; [1956] 2 All ER 872.

Complaint has been made that the justice in this case had a meeting with the chief veterinary officer, the public analyst and public officials on 19th March, when the matter was first referred to him, and that they never gave any evidence at the hearing on 2nd April. For my part, I do not think that the justice was prevented under this procedure from hearing the evidence of those officials, having a sample taken, inspecting the sample before and in the absence of the applicants. Nor do I think it necessarily any unfairness if those officials do not give evidence at the hearing, provided always that the objectors, the applicants, are told what the point is that they have to meet, and of course at this hearing they clearly knew and had evidence to deal with it.

But the point where I feel that the rules of natural justice in their limited application to such a case as this, limited to openness, impartiality and fairness, have been broken, is when the justice retired with the two officials in order, as he puts it, to take advice, and the three persons then came back into court and he announced his decision. It seems to me that in a case such as this a justice must be very careful not to take any fresh advice or hear any fresh evidence in the absence of the objectors, unless he returns and enables the objectors to know what the advice is that he has received thus enabling them to deal with it. To give an illustration of the present case, the public analyst had said the highest that he had put it was that the potatoes appeared to be unprocessed. Supposing when the justice retires with him, he says: 'I was being very cautious, I think it is quite clear they were unprocessed', one asks one's self should not the objectors have an opportunity of meeting that, and probably meeting it by cross-examination, to which in the ordinary way, this not being a trial, there would be no right. One looks to see what is fair.

But the matter does not end there, because this is, as s 9 (3) of the Act of 1955 says, a decision of the justice. It is not a decision of the justice together with the chief analyst and the chief veterinary officer, any more than the decision of a justice when he is sitting in a court of summary jurisdiction is the decision of himself and his clerk. It seems to me that in the present case the rules of natural justice in their limited, and very limited, application to a case such as this have been broken in the present case, and I would let the writ issue.

**JAMES J:** I agree with what LORD PARKER CJ has said and would add little. The justice, by virtue of the provisions of s 9 (2) of the Food and Drugs Act 1955 was under a duty to hear the applicants and any witnesses they called if they attended on the application for condemnation. Whether one calls that the exercise of a duty which is judicial, quasi-judicial or executive, it seems to me for the reasons already apparent from the judgment given, beyond question that the exercise must be attended with fairness and impartiality, and further that the exercise of that duty should be seen to be carried out openly, impartially and with fairness. To leave the room with the protagonists of the applicants, the man who had brought in the justice to adjudicate, with the person who has provided the evidence, namely the certificate of analysis, and then to return and announce a decision without indicating to the applicants what, if any, further advice had been given by those persons, in my judgment was a breach of the requirements that the procedure should be carried out seemingly open and with fairness.

**COOKE J:** I agree with both judgments.

*Order for certiorari.*

Solicitors: *Ince & Co; Sharpe, Pritchard & Co., for Town Clerk, Birmingham.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY, LJ, CANTLEY AND WALLER, JJ)

28th September 1970

R v RUSSELL

*Criminal Law—Evidence—Cross-examination of co-prisoner on character—Evidence given by co-prisoner against prisoner—Charged 'with the same offence'—'Same offence'—Possession by two prisoners of forged notes not joint but immediately successive—Criminal Evidence Act, 1898, s 1 (f), proviso (iii).*

Three persons, the appellant, B and H, were charged on an indictment with the possession and uttering of three forged £5 notes. Count 2 charged the appellant alone with uttering, count 3 charged H alone with being in possession of the notes, and count 4 charged both the appellant and B with being in possession of them. B pleaded guilty on count 4 to aiding and abetting, and the case proceeded against H and the appellant. The case for the prosecution was not based on joint possession by H and by the appellant, but on two successive acts of possession, the one immediately following the other. The appellant and H both gave evidence, each protesting his own innocence and seeking to blame his co-prisoner. Application was made at the trial by the appellant's counsel for leave to cross-examine H on his previous record under s 1 (f) proviso (iii) of the Criminal Evidence Act, 1898, on the ground that H had given evidence against him. The judge refused the application, being of opinion that, although H had given evidence against the appellant, the appellant and H were not charged with 'the same offence'. On appeal by the appellant against conviction,

**HELD:** the judge's ruling was wrong and the cross-examination should have been permitted; the offences charged against the appellant and H did not cease to be the same merely because the possession relied on by the prosecution was an immediately successive rather than a coincident one, for the subject-matter of the possession was the same, the nature of the offence was the same, and the circumstances to be proved were the same; accordingly, the cross-examination should have been permitted, and the conviction must be quashed.

APPEAL by George Russell against his conviction at Sheffield Assizes of uttering forged bank notes and being in possession of same when he was sentenced to concurrent terms of 15 months' imprisonment.

*P M Baker for the appellant.*

*N J Mylne for the Crown.*

**WIDGERY LJ** delivered this judgment of the court: The appellant, George Russell, was convicted at Sheffield Assizes of uttering forged bank notes and of being in possession of the same forged bank notes. He was sentenced to 15 months' imprisonment on each count and he now appeals against his conviction by leave of the single judge.

Three men were involved in activities in regard to the same forged notes which were three £5 Bank of England notes. In the event they were charged in the indictment as follows: the first count charged a man called Barraclough, with whom this court is not concerned, with uttering the three notes. He was in due course found not guilty by direction of the judge. The second count charged the appellant alone with uttering the notes and he was, as I have already indicated, convicted on that charge. The third count charged a man called Hurst with being in possession of the notes and he was convicted. The fourth count charged the appellant and Barraclough with joint possession of the same notes. The appellant was convicted

and Barraclough pleaded guilty on the basis of aiding and abetting. A further count was withdrawn and requires no further mention.

The offences being charged in that way, the case for the prosecution, as developed at the trial, depended entirely on the evidence of the two accused themselves. They had given statements to the police which were the basis of the proceedings, but there was no independent evidence about the activities of these men individually in regard to the three notes except that which came out from their own accounts. The view of the case taken by the prosecution on the material available to it was that the three notes in question had been possessed by the appellant, who had uttered them to Hurst. It followed therefore that the appellant would be guilty both of uttering and possession and that Hurst would be independently guilty of possession.

At the trial the appellant and Hurst both gave evidence and it suffices for this purpose to say that each told the same kind of story with the effect of placing the blame on the other. Thus the appellant in substance said that Hurst had had the notes in his possession and had offered them to the appellant who had declined to take them, a story which, of course, meant that the appellant was innocent and Hurst was guilty. Hurst returned the other side of the penny, alleging that he had been offered the notes by the appellant and had refused to take them.

It was in this state of affairs that a question arose as to the cross-examination of Hurst on his record under s 1 of the Criminal Evidence Act 1898. For the purposes of this judgment it can be assumed that both the appellant and Hurst had attacked witnesses for the prosecution and thus were in a position in which their characters could be put in at the instance of the prosecution. But for reasons which seemed good to him, counsel for the prosecution was not minded to cross-examine Hurst in regard to his character. Thus it became the interest of counsel for the appellant to cross-examine Hurst and bring in Hurst's character if he was able to do so. He sought to do so on two grounds, both contained in s 1 (f) of the Criminal Evidence Act 1898, under what has been described as provisos (ii) and (iii). I must read them although they are well known. Proviso (ii) permits cross-examination in respect of previous characters if the witness

'has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character... or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.'

Proviso (iii) provides for similar cross-examination where the accused in question has given 'evidence against any other person charged with the same offence'.

Counsel for the appellant sought in the court below to invoke each of those provisos. It was not disputed that Hurst had given evidence against the appellant for this purpose, nor for the purposes of this judgment so we challenge the proposition that Hurst had attacked the witnesses for the prosecution in the same way. Accordingly, said counsel for the appellant in the court below, the appellant may cross-examine Hurst on his record on either of these grounds. Taking them independently, the learned trial judge rejected counsel's submission on proviso (iii) on the ground that, although Hurst had given evidence against the appellant in the terms of the proviso, he and Hurst were not charged with the same offence. He rejected the application to cross-examine under proviso (ii) on the footing that where that proviso applied it was open only to the prosecution to cross-examine and not to a co-accused.

Dealing with proviso (iii) first, it is quite clear in this case that the offences charged against Hurst and the appellant were similar in really every respect. The subject of possession, namely the three forged notes, was the same, the nature of the offence

charged, namely illegal possession under s 8 of the Forgery Act 1913, was the same, and all the constituents which had to be proved were the same. But it was argued that nevertheless the offences charged against Hurst and the appellant were not the same offence because the possessions alleged against them were not coincident or concurrent but consecutive. It was accepted below (we think quite rightly accepted) that if the prosecution had been able to charge Hurst and the appellant with joint possession of the notes at one and the same time, the case for cross-examining Hurst against the appellant under proviso (iii) would have been clear. But it was argued below, and successfully argued below, that since the possessions were consecutive, following one another instantly but nevertheless consecutive and not joint, then the offence charged was not the same offence and accordingly the right to cross-examine was denied to the appellant.

Although the 1898 Act has been on the statute book for over 70 years, there is remarkably little authority on the meaning of the phrase 'the same offence' in proviso (iii). It does not really seem to have arisen directly for decision in any of the authorities to which we have been referred. In *Murdoch v Taylor* (1) in the House of Lords a very different issue arose under proviso (iii) and the court was there primarily concerned with the meaning of the words 'evidence against', but it is to be observed that LORD DONOVAN in his speech evidently took the view that the expression 'same offence' and indeed the general ambit of provisos (ii) and (iii) should be wide. He clearly contemplated the possibility that a co-accused might take advantage of proviso (ii) and also that the prosecution might take advantage of proviso (iii). But the case is not authority on any of these points and is of only passing value, as it seems to us, in the issue which we have to decide.

A case somewhat nearer to our problem is *R v Meek* (2) where a principal and an aider and abettor had been charged in the same count and the question arose whether they were charged with the same offence for present purposes. The decision of the court was that they were not charged with the same offence for a highly special reason, namely that it had become clear at an early stage of the trial that one of the two accused could not be convicted on this charge and all that remained was the technicality of finding him not guilty. That technicality had been omitted but the court held that notwithstanding that omission it could not regard the two accused then before the court as being charged with the same offence when one of them for all practical purposes was no longer charged in the relevant count at all. It seems to us therefore that we have to decide this question on basic principles with virtually no guidance from authority.

One turns to dictionaries for assistance as to the meaning of the word 'same' and counsel have both relied on Webster's Dictionary (3rd edn) which is now before us. In that work 'same' is described as 'resembling in every way, not different in relevant essentials, of one kind' and then there is the illustration from Boswell: 'We must not expect to be all happy in the same degree'. The second meaning is 'conforming in every respect' and the illustration there is, when the word is combined with 'as': 'Eat the same rations as the captain'. It is pointed out by counsel that in both those illustrations, in both those meanings, the word is not being used to describe two things which are identical but merely two things which possess the same relevant characteristics throughout. When we look at the matter in that way, it seems to us that the fact that the possession alleged in these cases is consecutive and not coincident does not prevent the offences from being the same for present purposes. We are not attempting to lay down any general principles which will be a solution to all cases of this kind hereafter because that is a task which has apparently proved too

(1) 129 JP 208; [1965] 1 All ER 406; [1965] AC 574.

(2) (1966), 110 Sol Jo 867.

difficult for our predecessors and we are unwilling now to assume it. But looking now merely at the circumstances of this case and accepting as we must that these two accused would have been charged with the same offence if it had been alleged that they had been jointly in possession of these three £5 notes, we find it impossible to say that the offences charged against them ceased to be the same for present purposes merely because the possession alleged is a successive possession rather than a coincident one. The possession here was, as I have pointed out, successive in an immediate sense; one, on the case for the prosecution, surrendered possession at the instant when the other received it. The subject-matter was the same, the nature of the charge was the same, the circumstances to be proved were the same and the offences took place, if not technically at the same instant, at moments which were immediately successive one with the other. We think that it would be a very unsatisfactory result in a case such as the present if the appellant were denied the right to cross-examine Hurst merely because their possessions were not at the same time but were successive. We think that justice requires us to reach the conclusion which we have reached and so far as this case is concerned we are satisfied that the offences charged should be regarded as the same offence. It follows from that that the learned judge was wrong and should have permitted cross-examination of Hurst on his record, and if that had been permitted it is impossible to say what the consequences might have been in the minds of the jury. This is a case where everything turned on the credibility of Hurst and the appellant. To deny the appellant the right to cross-examine Hurst on his character was a very serious denial and we can see no reason at all for applying the proviso to s 2 (1) of the Criminal Appeal Act 1968, or otherwise avoiding the necessary consequences of the judge's ruling. In the circumstances it is unnecessary to consider the effect of proviso (ii) to s 1 (f) of the 1898 Act.

Accordingly, for those reasons we shall allow the appeal and quash the conviction of the appellant. So far as these matters are concerned, he is discharged.

*Conviction quashed.*

Solicitors: *Registrar of Criminal Appeals; Freshfields.*

T.R.F.B.



**COURT OF APPEAL (CRIMINAL DIVISION)**

(LORD PARKER, CJ, PHILLIMORE, LJ, AND ASHWORTH, J)

5th October 1970

R v KULYNYCZ

*Arrest—Arrest without warrant—Validity—Erroneous statement that warrant had been issued—Defendant not informed at time of reason for arrest—Reason given to defendant at police station soon afterwards—Variation of charge.*

*Criminal Law—Venue—Indictable offences—Place where defendant 'in custody'—'Custody'—Criminal Justice Act, 1925, s 11 (1).*

At the request of the police at K the appellant was arrested at C. The arresting officer stated that a warrant had been issued at K (which was not the fact) on suspicion of offences committed there, and seven minutes later the appellant was informed by another officer at C police station that he had been brought there at the request of the police at K in connection with possible drug offences. A little later a constable from K arrived and told the appellant that he had been arrested on suspicion of handling stolen drugs and would be taken to K for questioning. He was later brought before justices at K and was committed for trial at N. Quarter Sessions, within whose jurisdiction K was, on charges of unauthorised possession of drugs 'at C or elsewhere'. He was legally represented and no application was made for him to be committed to C. for trial on the ground of hardship. He was accordingly committed to N. Quarter Sessions. He was there indicted on three counts alleging unauthorised possession of drugs 'at C.', contrary to s 1 (1) of the Drugs (Prevention of Misuse) Act, 1964. A submission made at the beginning of the trial that N. Quarter Sessions had no jurisdiction to try the case was rejected on the ground that jurisdiction existed under s 1 (1) of the Criminal Justice Act, 1925.

**HELD:** that although the original arrest was unlawful in that the appellant had not been informed in substance of the reason why he was being arrested, after he had been informed at the police station, in sufficient detail of the reason for his arrest, he was thereafter in lawful custody; neither the original erroneous statement with regard to the issue of a warrant nor the variation of the charges affected the question of lawful custody; assuming that custody in s 11 (1) of the Criminal Justice Act, 1925, meant lawful custody, the appellant, when he appeared at N. Quarter Sessions, was in custody within the meaning of s 11 (1) of the Criminal Justice Act, 1925; and, therefore, N. Quarter Sessions had jurisdiction to try him; as the question of the alternative committal to C. or possible hardship that the defendant might suffer if committed to N. had never been raised, the committal could not be upset.

**APPEAL** by Michael Kulynycz against his conviction at Norfolk Quarter Sessions of being in unauthorised possession of drugs, when he was sentenced to three years' imprisonment.

*D M Cheatle* for the appellant.

*M E Ward* for the Crown.

**LORD PARKER CJ** delivered this judgment of the court: On 7th January 1970 the appellant was convicted at Norfolk Quarter Sessions on three counts of being in unauthorised possession of drugs. He was sentenced to 18 months' imprisonment on the first count, 18 months consecutive on the second count and 18 months concurrent on the third, making in all three years' imprisonment. He now appeals against his conviction on a point of law.

What happened was that when this case came on for trial at Norfolk Quarter Sessions a submission was made at the outset that those sessions had no jurisdiction to deal with the matter in that in each case the possession was alleged to have been a possession in Cambridge which in the normal way would be outside the

jurisdiction of Norfolk Quarter Sessions. That application was overruled on the basis that jurisdiction existed by reason of s 11 (1) of the Criminal Justice Act 1925, which in certain circumstances deems an offence committed in one place to have been committed in another. The relevant words of the subsection are:

'A person charged with any indictable offence may be proceeded against, indicted, tried and punished in any county or place in which he was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence, as if the offence had been committed in that county or place, and the offence shall, for all purposes incidental to or consequential on the prosecution, trial or punishment thereof, be deemed to have been committed in that county or place.'

It was said, and the submission is repeated in this court, that the original arrest was unlawful and that nothing has cured or could cure that unlawful arrest, and, accordingly, when the matter came on before the Norfolk Quarter Sessions the appellant was not in custody on a charge for the offence within s 11 (1) in that 'custody' there must mean 'detained in lawful custody'. Of course, if the subsection merely means that jurisdiction arises if a man is found to be in custody, albeit unlawful, then the whole of counsel for the appellant's argument here falls to the ground. But without finally deciding the matter this court as at present advised considers that the words in the subsection 'in custody' do mean 'in lawful custody', and it is of that opinion notwithstanding that the subsection refers to a summons 'lawfully issued'. Accordingly the court proceeds to consider whether the appellant at the time he appeared before Norfolk Quarter Sessions was detained in lawful custody.

It has not been easy altogether to ascertain the true facts of the case, but it appears that the appellant was reasonably suspected—nobody has challenged that—of what one may call drug offences in King's Lynn. As the court understands it, although carrying on his activities in Cambridge, he was supplying people or 'pushing' drugs in King's Lynn, and accordingly the King's Lynn police asked the Cambridge police to arrest him and hand him over. As a result a Pc Crane at 4.25 pm on 6th August 1969 found the appellant in the market place at Cambridge and he arrested him, using some such words as that a warrant had been issued for his arrest at King's Lynn on suspicion of offences committed there. Pausing there, it is said (and in the opinion of this court rightly said) that that arrest was an unlawful arrest in the sense that it might in certain circumstances give rise to a civil action for false imprisonment. Without referring to the case in detail, it has been held by the House of Lords in *Christie v Leachinsky* (1) that when a policeman arrests a citizen, the citizen is entitled to know at any rate the act for which he is being arrested. It is put in this way: that in this country a person is *prima facie* entitled to his freedom and is only required to submit to restraints on that freedom if he knows in substance the reason why it is claimed that the restraint should be imposed.

Counsel for the appellant here points out that the only matter conveyed to the appellant on arrest was on suspicion of offences committed in King's Lynn, there being no identification of the nature of the offences or, as the court prefers to put it, of the act constituting an offence or offences. Counsel for the appellant further goes on to point out that the information moreover was wrong because as it turned out a warrant had not been issued. No doubt Pc Crane was sent off merely to bring the appellant into the station, did not know whether or not a warrant had been issued, and did not know the exact nature of the acts constituting the alleged offences. Seven minutes later the appellant was in the police station and there he was seen by Pc Welham, a member of the drug squad stationed at Cambridge. The appellant having been brought into the station, Pc Welham said to him:

(1) 111 JP 224; [1947] 1 All ER 567; [1947] AC 573.

'You have been brought to the police station as a result of a request from the King's Lynn Police in connection with possible drug offences.'

The appellant was cautioned and he replied: 'I know the score. I am saying nothing. I shall be out of here within 24 hours.' It is to be observed there that Pc Welham was more specific in that he referred not merely to offences generally, but to possible drug offences. Shortly after that, on that same evening there arrived from Norfolk Pc Elliott, who had come to take charge of the appellant and take him back to King's Lynn. He said:

'We are police officers from King's Lynn. You have been arrested on suspicion of handling stolen drugs and we are taking you back to King's Lynn for questioning.'

The answer he received was: 'You can't prove a thing against me. You realise you can only hold me for 24 hours'. There the information given to the appellant becomes still more specific because it not only deals with drug offences but sets out the particular kind of drug offences that the police in Norfolk reasonably suspected the appellant of having committed, namely handling stolen drugs. Moving on fairly quickly from there, he was brought to King's Lynn; he was there charged with handling stolen drugs and when the matter came before the committing justices the charge was a charge not of handling stolen drugs but of unauthorised possession of drugs, contrary to the Drugs (Prevention of Misuse) Act 1964, and the place alleged was not King's Lynn but 'Cambridge or elsewhere'. It was on that charge that the examining justices committed him to Norfolk Quarter Sessions.

When the matter got to the drafting of an indictment, it took the form of three counts alleging unauthorised possession of drugs at different dates and instead of 'at Cambridge or elsewhere', they were all alleged as possession 'at Cambridge'. As I have said, counsel for the appellant's argument is that, as the original arrest was unlawful, everything else that took place thereafter fell to the ground with the result that Norfolk Quarter Sessions had no jurisdiction to try the case. This court is quite unable to accept that argument. As it seems to this court, the question here is whether the appellant at the time when he was before the Norfolk Quarter Sessions was in lawful custody, and one asks oneself at what stage, if at all, did he become in lawful custody? On that point the court is quite clearly of opinion that when he was, in the police station at Cambridge, informed in sufficient detail by Pc Welham and then Pc Elliott, he was thereafter in lawful custody.

Counsel for the appellant says that before he could become in lawful custody he would have to be free, he would have to leave the police station and be rearrested. The court is quite unable to accept that contention. We are satisfied that, when in the police station shortly after arrest, he was told all that he was entitled to know within the House of Lords' decision of *Christie v Leachinsky* (1), that then at any rate he was detained in lawful custody. Once one reaches that stage, this court is quite clearly of opinion that it matters not that the offence alleged against him changed in character. As LORD SIMMONDS said in his speech in *Christie v Leachinsky*:

'These and similar considerations lead me to the view that it is not an essential condition of lawful arrest that the constable should at the time of arrest formulate any charge at all, much less the charge which may ultimately be found in the indictment, but this, and this only, is the qualification which I would impose on the general proposition. It leaves untouched the principle, which lies at the heart of the matter, that the arrested man is entitled to be told what is the act for which he is arrested. The "charge" ultimately made will depend on the view taken by the law of his act.'

(1) 111 JP 224; [1947] 1 All ER 567; [1947] AC 573.

Accordingly the fact that ultimately the appellant was charged not with handling stolen drugs but with possessing stolen drugs, and that the charge was a possession at Cambridge and not at King's Lynn cannot affect the lawfulness of the custody which in the opinion of this court arose in the police station at Cambridge.

Two other matters fall to be mentioned. Counsel for the appellant has relied strongly on the fact that Pc Crane, who quite clearly did not know what the position was, referred to the fact that a warrant had been issued, and counsel says that that wrong statement was, as it were, never cured and covered everything which happened thereafter. The court is quite unable to accept that. While the arrested person is entitled to know, as LORD SIMONDS said, the act giving rise to the arrest, he is not entitled to know whether it was by warrant or as a result of arrest on reasonable suspicion.

The other matter concerns the action of the examining justices in committing the appellant to Norfolk Quarter Sessions. It is said that they should have exercised a discretion which they had to commit him in all the circumstances to Cambridge. Section 2 (3) of the Magistrates' Courts Act 1952 gives the justices general powers by providing that a magistrates' court shall have jurisdiction as examining justices over any offence:

'... committed by a person who appears or is brought before the court, whether or not the offence was committed within the county or borough.'

and by s 9 (2) it is provided:

'If a magistrates' court proposes to commit a person for trial before a court of assize or quarter sessions that has jurisdiction to deal with the offence by virtue only of subsection (1) of section eleven of the Criminal Justice Act, 1925 [those are the deeming provisions]... then—(a) if it appears to the magistrates' court that the accused would suffer hardship if he were tried in the county or place aforesaid, the court shall not commit him for trial before the said court of assize or quarter sessions; (b) if the accused applies to the magistrates' court not to commit him to that court of assize or quarter sessions on the ground that he would thereby suffer hardship, and the magistrates' court refuses to comply with the application, the accused may appeal to the High Court, and the magistrates' court, on being informed by the accused of his intention so to appeal, shall not commit him to the court of assize or quarter sessions pending the appeal...'

The appellant was represented before the committing justices; he never asked for the matter to be committed to Cambridge or suggested that he would suffer hardship. What is said here is that nevertheless the justices on their own motion should have come to the conclusion that he would suffer hardship if tried at Norfolk Quarter Sessions and that he should be committed to Cambridge. The court has no reason to suppose that the justices did not properly consider the matter and came to the conclusion that the appellant would suffer no hardship by being tried at Norfolk Quarter Sessions. Accordingly in this highly technical, although no doubt important area, this court has come to the conclusion that the deputy chairman was correct in the ruling which he gave on the application made before the trial. In fact the appellant when the trial proceeded refused to plead, not wishing no doubt to submit to the jurisdiction, a plea of not guilty was entered and he was duly convicted. No question in connection with the trial other than the point of law which the court has dealt with, arises in the appeal and accordingly the appeal is dismissed.

*Appeal dismissed.*

Solicitors: Registrar of Criminal Appeals; Metcalfe, Copeman & Pettefar, King's Lynn.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, ASHWORTH and BROWNE, JJ)

19th October 1970

MORGAN v DIRECTOR OF PUBLIC PROSECUTIONS

*Criminal Law—Corruption—Act 'in relation to principal's affairs'—Defendant employee of car company—Defendant also performing trade union duties—Act in relation to trade union affairs also act in relation to company's affairs—Prevention of Corruption Act, 1906, s 1 (1).*

By s. 1 (1) of the Prevention of Corruption Act, 1906: 'If any agent corruptly accepts or obtains . . . from any person, for himself . . . any gift or consideration as an inducement or reward for doing . . . any act in relation to his principal's affairs or business . . . he shall be guilty of an offence.'

The appellant was employed by R, a motor car manufacturing company, as a standards room inspector. He was also elected convenor of shop stewards and received his normal wages while doing trade union duties. The company permitted him to perform his union duties during working hours, and he played a predominant part in negotiation with the management and in decisions relating to strikes. One Hurford ('H'), who carried on business on his own account, often acted as a sub-contractor for R, but in October, 1968, there was objection by the union to work which could have been done by R being done by outside firms, including work being done by H. As a result, H's work was 'blackened' by the union. Soon afterwards the union apologised for this action and withdrew its objection to work being done by H, who became interested in recovering on certain terms part of the work he had formerly done for R. On 16th December 1968 the appellant telephoned to H, whom he had not met previously. He suggested a meeting and said that there was to be a management/union meeting at R's next day. H met the appellant, who said that he could possibly make it easier for the work to be returned to H. According to H, the appellant also said that he would meet H after the meeting, and that H was to bring plenty of 'cash, fivers' with him. At the meeting no objection was raised from the union side to the work being returned to H. The appellant telephoned to H and informed him that at the meeting things had gone according to plan and invited H to meet him again. H agreed, and consulted R's chief security officer, his own solicitor, and the police. On 19th December H met the appellant as arranged, bringing with him £50 in £5 notes, and later he handed £25 to the appellant. The appellant was convicted at a magistrates' court for that, being an agent of R, he corruptly obtained £25 from H as an inducement for doing an act in relation to his principal's affairs, contrary to s. 1 (1) of the Prevention of Corruption Act, 1906. Quarter sessions dismissed an appeal, and from that decision the appellant appealed to the Divisional Court, his substantial contention being that he had acted throughout as agent for the union and in relation to union affairs and not in relation to the company's affairs.

HELD: the words 'in relation to his principal's affairs' in s 1 (1) of the Act of 1906 should be widely construed; in the present case the conditions precedent to an offence had been proved, the appellant being an agent, and what was done by him, albeit it was in relation to the union's affairs, was also in relation to the affairs of the company, R, his principal; therefore the conviction was right.

CASE STATED by Glamorgan Quarter Sessions. The facts are sufficiently stated in the headnote.

H E Hooson QC and T H Moseley for the appellant.

John Davies QC and Patrick Webster for the Crown.

**LORD PARKER CJ:** This is an appeal by way of Case Stated from a decision of Glamorgan Quarter Sessions who dismissed an appeal by the appellant from his conviction by justices for the county sitting at Caerphilly on a charge that, being an

agent of the Rover Co Ltd, he corruptly obtained a sum of £25 from John Leonard Hurford as an inducement for doing an act in relation to his principal's affairs, contrary to s 1 (1) of the Prevention of Corruption Act 1906.

What has given rise to the trouble in this case concerns what happened at the meeting on Thursday, 19th December 1968, when the £25 was handed over. The charge here was that the appellant had corruptly obtained that money as an inducement for doing an act in the future. There was also an argument whether it could be said that he was, in relation to this matter, acting as an agent of the Rover Co Ltd as alleged in the indictment, and whether the inducement was to do an act in relation to Rover's affairs as opposed to the union's. In the Case Stated there are strong passages indicating that the £25 was not paid as an inducement for some future act, but as a reward for past favours, 'squaring' the shop stewards and advising the management at the meeting as he did. The notes contained passages such as this: Mr Hurford: 'Now I must go.' The appellant: 'I've done my part: now it's your turn.' Mr Hurford: 'What?' The appellant: 'I earn £25 per week, I think what I did yesterday is worth £25.' A little later on, the appellant said: 'If I have to do any more in the future we can sort it out when the occasion arises', and further on in the evidence there is a note purporting to record Mr Hurford's evidence which states definitely '£25 was for work done on Wednesday'. On the other hand there are a number of passages which would apparently suggest that Mr Hurford was not prepared to hand over the £25 as a reward for the past but wanted certain assurances for the future, and those passages can be summarised in this way: 'He gave me to understand that if there was any trouble with the vehicles or drivers at Rover's he'd squash it. He'd see I did not get any undue stoppages. He'd stop them before they got into motion.' Then a reference was made to the storage contract which Mr Hurford had, and the notes read:

'I had a contract for a storage of material. He would see that nothing interfered with my work. If cowboying was necessary he'd see it was all right. I asked him what guarantee I'd get for this payment of £25. He said he would keep the onus off my firm. He was in a position to say out, and not out.'

Under cross-examination he was asked 'as a reward for doing what?' Mr Hurford said: 'He insisted'; then this passage 'Also taking into account he could reverse decisions previously made'.

All this court has, of course, is those abbreviated notes of evidence, some of which point one way and some point another, but quarter sessions had Mr Hurford himself before them and heard his evidence in full. For my part, it is quite impossible to say, as it seems to me, that, whereas the £25 may well have been in part a reward for what had been done, it was not also in part an inducement for acts to be done in the future. It seems to me that this court could not possibly say that quarter sessions were not entitled to take that view.

The other matter that arises in this case concerns the position of the appellant himself in relation to this matter. It was said with some force by counsel for the appellant that really from beginning to end in relation to this matter he was acting as agent for the union and in relation to union matters, and, accordingly, that he had been wrongly charged. Attractive as counsel for the appellant's argument is, I am satisfied that it is wrong. The opening words of s 1 (1) of the 1906 Act are: 'If any agent corruptly . . . obtains', not, as it observed, 'as an agent corruptly obtains'. Moreover, 'agent' includes, by the definition in s 1 (2), 'any person employed by or acting for another'. It is quite clear that in fact the appellant was an agent within s 1 (1), namely, an agent of Rover's. The real point is whether, there being an obtaining of money as an inducement for the doing of some other act, that act was



to be in relation to his principal's affairs, namely Rover's affairs. It is counsel for the appellant's argument that the words 'any act in relation to his principal's affairs' in s 1 (1) must mean in direct relation to his principal's affairs or, put another way, in relation to matters concerning his principal where he owes a duty as an agent. Read in that way, it can be said that, while the appellant was an agent of Rover's, nevertheless the act in question was in relation to union affairs albeit against the background of the business that Rover's carried on. For my part, I am quite satisfied that those words 'in relation to his principal's affairs' fall to be widely construed, as indeed they were in the only case to which the court has been referred, *R v Dickinson, R v De Rable* (1), where PRITCHARD J, in giving the judgment of the Court of Criminal Appeal, said:

'In the judgment of the court the words of s 1 of the Act of 1906 are designedly very wide, and it would be undesirable in the extreme to narrow their meaning in the way which would be necessary if the argument on this first point were held to be valid.'

It seems to me that the conditions precedent to an offence being proved are present here; the appellant was an agent, and what was done here, albeit it was in relation to the union affairs, was also in relation to his principal's affairs, namely Rover's affairs.

In those circumstances, I have to come to the conclusion that this appeal fails, and should be dismissed.

**ASHWORTH J:** I agree.

**BROWNE J:** I agree.

*Appeal dismissed.*

Solicitors: *W H Thompson; Director of Public Prosecutions.*

T.R.F.B.

(1) (1948), 33 Cr. App Rep 5.

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**COURT OF APPEAL (CRIMINAL DIVISION)**

(MEGAW, LJ, CANTLEY and JAMES, JJ)

12th, 27th October 1970

R v ASTON. R v HADLEY

*Criminal Law—Obtaining pecuniary advantage by deception—Betting transaction—Operative inducement—Theft Act, 1968, s 16 (2) (a) (c).*

By s 16 (1) of the Theft Act, 1968, it is an offence for a person by any deception dishonestly to obtain for himself or another any pecuniary advantage. 'Pecuniary advantage' is defined by s 16 (2) under three separate heads. Paragraph (a) provides for where 'any debt or charge for which [the defendant] makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred'. Paragraph (c) provides for the case where the defendant 'is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting'.

The appellants, A and H, who were acting in concert, entered a betting shop at Lichfield soon before a greyhound race at Hackney was due to start. The appellant A handed to the counter clerk a betting slip for a £70 win on a particular dog. The manager authorised the acceptance of the bet and the slip was given to the cashier, who rang the bet up on the till. The clearly understood practice was that when a bet was accepted the stake was payable immediately in cash, and at a time when the race had either just started or was about to start, the manager asked the appellants for the stake money. The appellant A had a bundle of currency notes, some of which came from the appellant H. He proceeded to count them with extreme slowness and no money was paid over by him. This conduct continued until the progress of the race, which could be followed in the betting shop on a broadcast relay, made it obvious that the selected dog was not going to win. The appellants then gathered up the money and hurriedly left the shop. The indictment was framed on the basis of para (a) and alleged that the appellants dishonestly obtained for the appellant A a pecuniary advantage, namely, the evasion of a debt for which A had made himself liable by the false representation that he (A) intended to pay immediately the stake in respect of the bet which he had made. The appellants were convicted. On appeal,

HELD: the conduct of the appellant in slowly counting the money could not safely or satisfactorily be presented to, or accepted by, the jury as a deception involving a representation that the appellants intended to pay 'immediately', nor was it possible to reach the conclusion that the counting of the money, whether or not the slowness was taken into account, operated on the manager's mind in such a way as to bring about the evasion of the debt, and so the convictions must be quashed.

HELD, further: the difficulties which had arisen could have been avoided and an unassailable conviction might well have resulted if the particulars of the indictment had been framed by reference to s 16 (2) (c) instead of s 16 (2) (a); when someone sought to place a bet in a cash betting shop a jury might well take the view that he represented, and intended to be understood to represent, that it was his intention to pay the stake in cash as soon as his bet had been accepted; such an approach could have put the slow counting of the money in the right place—as strong evidence of an earlier deception with regard to intention rather than being itself a deception.

APPEALS by Brian Gideon Aston and Malcolm Thomas Hadley from their conviction at Burton-upon-Trent Quarter Sessions of obtaining a pecuniary advantage by deception, contrary to s 16 (1) of the Theft Act 1968 when they were each sentenced to 12 months' imprisonment.

N T Salts for the appellants.

P J Stretton for the Crown.

*Cur adv vult*

27th October. **MEGAW LJ** read this judgment of the court: The two appellants, Brian Gideon Aston and Malcolm Thomas Hadley, were convicted at Burton-upon-Trent quarter sessions on 7th April 1970 of obtaining a pecuniary advantage by deception. They were each sentenced to 12 months' imprisonment. The single judge granted them both leave to appeal against conviction.

The facts which the prosecution asked the jury to accept, and which, it would seem, the jury did, at any rate substantially, accept, were these. About midday on 24th January 1970, the two appellants together entered a betting shop at Lichfield. A greyhound race at Hackney was due to start at 1.05 pm. Very shortly before it was due to start, the appellant Aston handed to the counter clerk a betting slip made out for a £70 bet to win on the dog in trap 1 in the race at Hackney. The counter clerk's limit was £10, so she gave the slip of paper to the manager, Mr Hine. He said 'All right', and the slip was given to the cashier who rang the bet up on the till. Mr Hine collected the receipt from the cashier and went to the counter where the appellants were. It may be accepted for present purposes that it was known to all concerned that the transaction was accepted by the betting shop as being a cash betting transaction, and that the clearly understood practice was that, when a bet was accepted, the stake was payable immediately in cash. It may be accepted also that the two appellants were acting in concert with each other in all that was done by either of them. Mr Hine asked for the stake money. At this stage the 1.05 pm race at Hackney either had already started or was about to start. The appellant Aston had a bundle of currency notes, some of them emanating from the appellant Hadley. The appellant Aston proceeded to count the notes with extreme slowness, purporting to select £70 worth out of a larger total in his possession. Mr Hine offered the receipt and demanded the money, but the slow counting continued and no money was paid over by the appellant Aston to Mr Hine. This play-acting by the appellant Aston was still going on when the progress of the race, which could be followed in the betting shop on a broadcast relay, made it obvious that the dog from trap 1 was not going to win. The appellants then gathered up the money which up to that moment the appellant Aston had still been purporting to count. He and the appellant Hadley went out of the betting shop with some degree of haste. Mr Hine followed them through the streets and caught up with them after half-a-mile or so. Then the police came on the scene.

The prosecution suggested that the whole thing was a dishonest charade, whereby the appellants could achieve the happy situation of 'Heads I win, tails you lose'. The bet having been accepted by the betting shop, if the dog in trap 1 should win the appellants would claim that they were on the bet and they would demand a sum which, as the odds were, would have been about £200. They hoped, and perhaps expected, that in that event, by reason of successful deceit, or bluff or by making a nuisance of themselves, they would be paid on the basis that they had won the bet, although they had no intention of paying the stake money if their chosen dog failed to win. If that happened, if their dog lost, they intended to do as they in fact did; i.e. to disappear quickly from the scene, and, if they should be caught up with and challenged, they would assert that no bet had been made, because no cash had been paid. Clearly, and not surprisingly, the jury accepted that the appellants had a dishonest intent. No criticism can be made, or is made, of the direction of the recorder to the jury so far as it referred to the element of dishonesty. He made it clear beyond doubt that, unless the jury were satisfied on all the evidence of a dishonest intent, the verdict must be not guilty. The verdict was guilty.

That, however, is not the end of the matter. At the close of the case for the prosecution counsel for both appellants submitted that there was no case to answer because the facts as proved on any view did not support the charge as laid in the indictment.

After lengthy arguments, the recorder overruled those submissions and his direction to the jury thereafter involved that, subject to the jury reaching certain conclusions on various matters of fact which were in issue, in addition to the question of dishonest intent, the jury should convict on the indictment as drawn.

Before this court, counsel for the appellants again contended that the appellants could not properly be found guilty of the charge as laid, whatever the jury's conclusions on the evidence adduced. There was, it is said, misdirection by the recorder which necessarily followed from his rejection of the submissions by the defence. The essence of this matter is the wording of the indictment. It is there alleged that the appellants had obtained a pecuniary advantage by deception, contrary to s 16 (1) of the Theft Act 1968. The particulars of offence were that the appellants dishonestly obtained for the appellant Aston a pecuniary advantage, namely the evasion of a debt for which the appellant Aston had made himself liable, by the false representation that the appellant Aston intended to pay immediately the amount of the stake in respect of the bet which he had made. Section 16 (1) of the Theft Act provides:

'A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.'

The Act itself defines 'deception' and 'pecuniary advantage' for the purposes of this section. 'Deception' is defined by s 15 (4) (which is applied to s 16 by s 16 (3)) as follows:

'For purposes of this section "deception" means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.'

'Pecuniary advantage' is defined by s 16 (2) under three separate heads, set out in para (a), (b) and (c). This indictment was framed on the basis of para (a). Hence the problems which have arisen, and which would not have arisen, as counsel for the appellants concedes, if para (c) had been applied. Paragraph (a) provides:

'any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred.'

The prosecution by the wording of the indictment thus took on themselves the task of proving (i) that there was a debt for which the appellants had made themselves liable; and that the appellants (ii) dishonestly, (iii) by a deception, (iv) obtained the evasion of that debt.

The first submission for the appellants, at the trial and before this court, was that there was not a debt. As this was, and was known by all to be, a cash betting transaction, there was, it is contended, no liability on either side until the cash had been actually handed over. The recorder, it was submitted, erred in telling the jury that they could find that there was a debt. This court has no hesitation in rejecting that submission. It is to be observed that, by the words of s 16 (2) (a), the debt is not necessarily legally enforceable. It was, in the view of this court, clearly open to the jury to find, having been correctly directed in this respect, that there was a debt. Once the appellants had offered to place the bet and that offer had been accepted and its acceptance notified to the appellants, the jury could properly find that there was a debt, consisting of their obligation, by virtue of the agreement or arrangement made at their request, to hand over the stated stake money forthwith. If the jury were satisfied that Mr. Hine was, to the knowledge of the appellants,

ready and willing to perform his obligation, namely to hand over the receipt concurrently with the appellants handing over the stake money, the fact that he had not actually handed over the receipt because the appellants were not carrying out their part of the bargain by handing over the money is irrelevant. It does not prevent the existence of a debt because, if the dog from trap 1 had won, the betting shop, if it had proved dishonesty on the part of the appellants, might have been entitled to treat the whole transaction as avoided. As regards the element of dishonesty which the prosecution had to prove, as has been said, the recorder's direction cannot be criticised, and the jury's finding cannot be faulted.

The second submission for the appellants relates to the elements of deception and evasion. The prosecution have to prove an evasion of the debt obtained by deception. For the appellants, it is said that the evasion, if any, of the debt was not caused by the deception alleged in the indictment. The deception alleged in the indictment was a false representation that the appellant Aston intended to pay the £70 immediately. The relevant deception as asserted by the prosecution at the trial, and as contended for on behalf of the prosecution in this court, was expressed in this way by the learned recorder in directing the jury:

'Mr Hine, the debt having been incurred, would never have kept the bet open, that is to say, continued to be on risk to pay out after he had rung it up in the till unless Aston had repeated to him that he intended to hand over immediately the £70, and the prosecution say that he did that by doing the slow count, by counting it out there, and then indicating that he intended to pay the £70. And what the prosecution say is, Mr Hine wouldn't have offered it, and Mr Hine couldn't because he kept the bet open, and the bet being kept open constituted the debt, the evasion of which we are concerned with, unless [the appellant] Aston represented to him he intended to pay the £70 there and then, and this being a cash transaction the obligation was to pay immediately.'

It should be stressed that, when the recorder said: 'Aston had repeated to him that he intended to hand over immediately the £70' he must have been suggesting a representation to be inferred from conduct, since there does not appear to have been any evidence of any such statement by the appellant Aston. If there had been any express statement by the appellant Aston to that effect, the position might have been different. As it is, however, the prosecution were asserting that the deception was a deception by conduct; and the conduct relied on was the slow counting of the money.

In the opinion of this court, in addition to other possible difficulties in attempting to force the facts of this case into the framework of s 16 (2) (a), the conduct of the appellants in the slow counting of the money could not safely or satisfactorily be presented to, or accepted by, the jury as a deception involving a representation that, as it was put, the appellants intended to pay 'immediately'. Whatever representation the slow counting might be thought to involve, it could hardly be a representation of an intention to make an immediate payment. Moreover, to be relevant, the deception, for the purposes of s 16 (2) (a), must at least normally be a deception which operates on the mind of the person deceived so as to influence him to do or to refrain from doing something whereby the debt is deferred or evaded. It would require an unacceptable stretch of the imagination, on the evidence in this case, to reach the conclusion that the counting of the money operated, whether or not the slowness is taken into account, on Mr Hine's mind in such a way as to bring about the evasion of the debt.

There was, accordingly, a misdirection which followed initially from the acceptance of the prosecution's submissions that the facts proved could bring the case within the terms of the indictment as framed by reference to s 16 (2) (a). That does not mean that dishonest conduct of this sort falls outside the scope of the criminal law or

that it can be resorted to with impunity. The difficulties which have arisen could have been avoided, and an unassailable conviction might well have resulted, as counsel for the appellants was prepared to concede, if the particulars of the indictment had been framed by reference to s 16 (2) (c) instead of s 16 (2) (a) of the Theft Act 1968.

Paragraph (c) provides the third class of 'pecuniary advantage' for the purposes of s 16. It provides:

'he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.'

Had the indictment been framed by reference to that paragraph, a jury might well have had no difficulty, on the facts in evidence, in finding that there was a deception. When someone seeks to place a bet in a cash betting shop, a jury might well take the view that he is representing, and intending to be understood to represent, that it is his intention to pay the stake in cash as soon as his bet has been accepted. A jury might well have found, by reference to what happened thereafter—the slow counting and the walk out when the failure of the trap 1 dog was apparent—that that representation was untrue; that it amounted to a deception; and that that deception (not the slow counting, but the original representation of intention) had operated on Mr Hine's mind so as to influence him to allow the bet to be placed; and thereby to give the appellants the opportunity to win money by betting. It would have been nonetheless an 'opportunity . . . to win money by betting' because, if the dog from trap 1 had won the race, the betting shop, because of the conduct of the appellants, might not have paid the winnings and might have been free from an obligation, legal or moral, to pay. That is the same point as we have mentioned earlier in relation to the existence of a 'debt' notwithstanding dishonesty. This approach puts the slow counting of money in its right place. It was strong evidence of an earlier deception, rather than being itself a deception.

However, although the appellants might well have been convicted on a differently drawn indictment, this is not a case in which the powers of the court either under s 3 or the proviso to s 2 (1) of the Criminal Appeal Act 1968 are applicable. Accordingly, as the court has previously pronounced, the convictions of both the appellants are quashed. They, and other persons, would, however, be ill-advised to act in this way in future, as they might find it difficult to escape from the teeth of s 16 (2) (c), should a jury be convinced of their dishonesty.

*Appeal allowed.*

*Solicitors: Registrar of Criminal Appeals; Addison, Cooper, Jesson & Co, Walsall.*

T.R.F.B.



QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, ASHWORTH and BROWNE, JJ)

29th, 30th October 1970

R v TOTTENHAM DISTRICT RENT TRIBUNAL. Ex parte FRYER BROS  
(PROPERTIES LTD)

*Rent Control—Contract referred to tribunal—Entry upon consideration of reference—  
Papers considered by each member of tribunal individually—Assembly and visit to view  
premises—No admission obtained—Letter of withdrawal—Not operative till received  
by tribunal—Rent Act, 1968 (c 23), s 73 (1).*

By s 73 (1) of the Rent Act, 1968: 'Where a Part VI contract is referred to a rent tribunal and the reference is not, before the tribunal have entered upon consideration of it, withdrawn by the party or authority who made it, the tribunal shall consider it and then, after making such inquiry as they think fit and giving to each party to the contract . . . an opportunity of being heard or, at his or their option, of submitting representations in writing, the tribunal, subject to sub-ss (2) and (3) below—(a) shall approve the rent payable under the contract, or (b) shall reduce the rent to such sum as they may, in all the circumstances, think reasonable. . . .'

When each member of a rent tribunal has entered upon consideration of the relevant documents individually and they have then assembled and gone to the premises for a view, even though admission has not been obtained, the tribunal has 'entered upon consideration of' the reference within the meaning of s 73 (1).

A letter of withdrawal is not operative until, at any rate, it has been received by the tribunal itself.

MOTION for an order of certiorari to quash a decision of the Tottenham District Rent Tribunal reducing the rent of flat 4, 7 Princes Avenue, Muswell Hill, London, owned by the applicants, Fryer Bros (Properties) Ltd.

L A Marshall for the applicants.

Gordon Slynn for the tribunal.

**LORD PARKER CJ:** In these proceedings counsel moves on behalf of the applicants, Fryer Bros (Properties) Ltd, for an order of certiorari to quash a determination made by the Tottenham District Rent Tribunal on 12th December 1969 on an application by the tenant, a Mr Penn, reducing the rent in respect of flat 4, 7 Princes Avenue, Muswell Hill, London N 10. The grounds on which the relief was originally sought were twofold—first, and I only mention it to get it out of the way, alleging that the chairman of the rent tribunal was so biased as to be unable to perform his duties as chairman in a judicial manner. Happily that ground has been specifically abandoned by counsel for the applicants. The second ground, and the one which falls to be considered here, is that the tribunal had no jurisdiction to determine the rent, the reference having been withdrawn by the tenant before the tribunal had entered on consideration of it.

Before referring to the facts, it is convenient to look at the provision which falls to be construed, s 73 (1) of the Rent Act 1968, which provides:

'Where a Part VI contract is referred to a rent tribunal and the reference is not, before the tribunal have entered upon consideration of it, withdrawn by the party or authority who made it, the tribunal shall consider it and then, after making such inquiry as they think fit and giving to each party to the contract and, if the dwelling is one the general management whereof is vested in and exercisable by a housing authority, to that authority, an opportunity of

being heard or, at his or their option, of submitting representations in writing, the tribunal, subject to subsections (2) and (3) below,—(a) shall approve the rent payable under the contract, or (b) shall reduce the rent to such sum as they may, in all the circumstances, think reasonable . . .’

The short facts here were that the tenant became the tenant of this flat in 1969. On 8th October on form FR 2 he referred the contract of letting to the rent tribunal. On 22nd October he sent in the requisite form, form FR 5, setting out the terms of the tenancy and other information. On 13th October the tribunal wrote fixing 24th November, a Monday, for the view and for the hearing. On 21st November the tenant came to an agreement with the applicants and wrote a letter withdrawing his reference to the tribunal. On 24th November the tribunal, however, went to view the premises; they were unable to obtain access, and accordingly they adjourned the hearing that day and proceeded to hear and adjudicate on the matter on 12th December.

Pausing there, if that stood alone, it might be said that they had no business to go on as they did after the notice of withdrawal. But the matter does not end there, because it is quite clear that the tenant’s letter of 21st November, a Friday, was not in fact received by the clerk to the tribunal until 9.30 am on the Monday and not seen by or communicated to the members of the tribunal itself until later that morning after the abortive view.

In the meanwhile the evidence is, and there is no reason to disbelieve it, that when the sittings ended on 21st November the clerk handed to each member of the tribunal the papers concerning this reference which was to be heard on the Monday morning following a view. In an affidavit sworn by the chairman, after consulting the other two members, he said that over that weekend, either on the Friday evening, the Saturday or Sunday, each member of the tribunal considered the papers, and indeed he, the chairman, began to make a record which is kept of the facts of the case; that they then assembled on the Monday morning and went to the view; they cannot say whether there was a discussion on the way, but he thinks that there may have been, and then on arriving at the premises they were unable to obtain admission. It was not until after that, and after they had inspected other properties concerning cases in their list, that they returned and were told of the withdrawal. The question is whether in all these circumstances the withdrawal was made before the tribunal, to use the words of the section, had ‘entered upon consideration of it’.

The first thing to observe is that the section is not worded in the form ‘Before the tribunal have entered upon the reference’ when by analogy with arbitration proceedings it would no doubt be the case that the tribunal would not have entered upon the reference until they began the actual hearing; entry upon consideration clearly antedates the hearing. Further, it is not without interest to observe the exact wording here compared with the earlier Act of 1946. By s 2 (2) of the Furnished Houses (Rent Control) Act 1946 it was provided:

‘Where any contract to which this Act applies is referred to a tribunal, then, unless at any time before the tribunal have entered upon consideration of the reference it is withdrawn by the person or authority by whom it was made, the tribunal shall consider it and, after making such inquiry . . .’

Whether it was done deliberately or not I know not, but the ‘then’ has been transposed in the present legislation, and, giving the subsection its normal meaning, it separates consideration from making inquiries, presumably having a view and having a hearing or considering representations. In other words ‘entered upon consideration of it’ is really put back to a very early stage in the proceedings.

It would be quite wrong to lay down a definition of the expression. Each case must depend on its own particular facts, but for my part I confess here that when each member of the tribunal has entered upon consideration of the documents and assembled and gone to the premises to have a view, that at any rate then they have entered upon consideration of the matter.

There are two other points, however, which I should deal with which have been raised by counsel for the applicants. He says that, however early in the proceedings one puts back consideration, it must be a consideration by the tribunal as a body; they must meet together and consider, and that it cannot be said that the tribunal consisting of three members have entered upon consideration of the matter merely when each member of the tribunal has himself considered it, although not jointly with the others. For my part, I am quite unable to accept that; it seems to me that when three members of a court individually begin to consider the matter it is a consideration by the court or, as here, by the tribunal.

The other point raised by counsel for the applicants is that withdrawal, he would say, can take place when the letter of withdrawal is posted or written, and that the withdrawal does not depend on communication to the tribunal. In my view, it is not withdrawn until at any rate it is received by the tribunal itself. Accordingly, in these circumstances I think the tribunal were justified in continuing with the reference and I would dismiss this motion with costs.

**ASHWORTH J:** I agree.

**BROWNE J:** I agree.

*Motion dismissed.*

Solicitors: *Trott & Gentry; Solicitor, Ministry of Housing and Local Government.*

T.R.F.B.

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**QUEEN'S BENCH DIVISION**

(LORD PARKER, CJ, ASHWORTH AND BROWNE, JJ)

20th October 1970

SMITH v COLE

*Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Provision of specimen—Blood—Analysis by ordinary equipment and skill—Gas chromatography.*

Analysis of a specimen of blood under s 3 (1) of the Road Safety Act, 1967, by gas chromatography is now analysis by the use of ordinary equipment and can be performed by a reasonably competent analyst.

*R v Nixon* (133 JP 520) and *Earl v Roy* (133 JP 427) considered.

CASE STATED by Essex justices sitting at Clacton-on-Sea.

An information was preferred by the respondent Leonard George Cole, against the appellant, John Bernard Smith, charging him with driving a motor vehicle with a proportion of alcohol in his blood above the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967. A blood sample had been provided by the appellant on 18th December 1969 and was sent to the Metropolitan Police Laboratory where it was analysed six days later by Mr Dennis Goodwin. The appellant sent a sample to Dr Anne Robinson, at the Department of Forensic Medicine at the London Hospital Medical Centre, who analysed it on 19th December. Both samples disclosed a proportion of alcohol in the blood above the prescribed limit.

A F B Scrivener for the appellant.

B J Higgs for the respondent.

**LORD PARKER CJ:** When this matter was before the justices it was contended on behalf of the appellant that the prosecution had failed to show that the blood sample was capable of accurate analysis by ordinary methods by a reasonably competent analyst, reference being made to *R v Nixon* (1), a decision of the Criminal Division of the Court of Appeal where it was laid down that the specimen must be capable of analysis by the use of ordinary equipment and ordinary skill by a reasonably competent analyst. It is urged that the prosecution has not so proved, since it appeared that both Mr Goodwin and Dr Robinson found their respective samples clotted and had to use gas chromatography.

What is really urged here is that the decisions in *R v Nixon* (1) and in *Earl v Roy* (2) both referred to gas chromatography as sophisticated equipment only available to the favoured few—I am paraphrasing what was said. The evidence in *Earl v Roy* was that it needed very expensive apparatus, access to which very few, if any, analysts had. Here we have a case, as it comes before the justices, where both analysts, without apparently any complaint at all, used gas chromatography, and for my part I can see no reason why in those circumstances the justices, after being referred to *Earl v Roy* and *R v Nixon*, should not have said that they were satisfied that this was today a suitable sample. Both these analysts had the apparatus, and we are satisfied, unlike the earlier days, that that apparatus is now available to many analysts and not merely to the favoured few. Accordingly, I see no ground whatever to interfere with the decision, and I would dismiss the appeal.

**ASHWORTH J:** I agree.

**BROWNE J:** I agree.

*Appeal dismissed.*

Solicitors: Oswald Hickson, Collier & Co, for J Bernard Smith, Clacton-on-Sea;  
T Hambrey Jones, Chelmsford. G.F.L.B.

(1) 133 JP 520; [1969] 2 All ER 688.

(2) 133 JP 427; [1969] 2 All ER 684.

QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, ASHWORTH AND BROWNE, JJ)

20th October 1970

LONDON BOROUGH OF REDBRIDGE v JAKUES

*Highway—Obstruction—Stall for sale of goods—Implied licence by local authority.*

A valid licence cannot be granted or implied for the performance of an unlawful act, e.g. the erection on the highway of a temporary structure for the sale of goods which prevents the free passage of the public or vehicles to every part of the way.

CASE STATED by justices for the North East London Area sitting at Stratford.

On 31st December 1969 an information was preferred by the appellant, the London Borough of Redbridge, against the respondent, Anthony Francis Jaques, charging that he, on 13th November 1969, without lawful authority or excuse did wilfully obstruct the free passage along the highway Manford Way, Hainault, in the London Borough of Redbridge, by the parking of a motor vehicle and the erection of a stall-like structure from the rear thereof in the service road contrary to s 121 (1) of the Highways Act 1959.

On 13th November 1969 the respondent operated as a fruit and vegetable salesman from a motor vehicle and stall in a stationary position in the service road in Manford Way, Hainault. The respondent had, with the knowledge of the local authority, conducted his business in the same position on Thursday afternoons for several years without complaint, and he contended that he, having traded from the same position for several years to the knowledge of the local authority, had an implied licence to be there. The justices dismissed the information, and the local authority appealed.

G R Bartlett for the local authority.

The respondent in person.

**LORD PARKER CJ:** This is an appeal by way of Case Stated from a decision of justices for the North East London Area sitting at Stratford, who dismissed an information preferred by the appellant, the London Borough of Redbridge (the 'local authority'), against the respondent, that on Thursday 13th November 1969, without lawful authority or excuse, he did wilfully obstruct the free passage along the service road in Manford Way in the borough, a highway, by the parking of a motor vehicle and the erection of a stall-like structure from the rear thereof in the service road, contrary to s 121 (1) of the Highways Act 1959. The respondent is in business as a salesman of fruit and vegetables, and does so from a motor vehicle and a stall. For many years now on a Thursday afternoon, Thursday being early closing day in the borough, he has been wont to go on this service road, and no doubt fulfil a need. For years he has done this; the police have refrained throughout from taking any proceedings, and the local authority has refrained from taking any proceedings. For some reason, which is by no means clear to me, it was decided at long last, on 31st December 1969, to prefer this information.

What was found here was, quite shortly, that the service road was a highway, and that the respondent brought his motor vehicle and stall and erected it on Thursday afternoons, including Thursday 13th November, in respect of which the information was laid. The justices dismissed the information, being of opinion:

that 'the appellant had condoned to, and condoned, the conduct of the respondent and in effect had given him licence to trade from this position in the roadway and we accordingly dismissed the information.'

It is implicit in that which the justices found, and indeed they were bound on the facts to find, that there had been a wilful obstruction of the free passage of the highway. There was no lawful authority or excuse, and it could not be said that the erection of the stall and the parking of the vehicle was in law a reasonable user of the highway which is there for the free passage of persons and vehicles to and fro. As has been held many times, any erection of a structure which for a period and not merely temporarily prevents the free passage of the public or vehicles to every part of the road is an obstruction.

One cannot help feeling sorry for the respondent, and, as I have said, I have been not at all satisfied as to the real reason for this prosecution. Indeed it may be, as the respondent himself thinks, that it has been the result of complaints from one of the shopkeepers who has changed his early closing day from a Thursday, and is therefore open on a Thursday. I know not. But when the matter comes before this court, the court is not concerned with the reasonableness of the prosecution. Once the prosecution has been launched and is proceeded with, it is for the court to determine it according to law.

The only question that remains is whether the justices were entitled to say, as they did, that in effect the local authority had granted the respondent a licence. It is enough to say, in my judgment, that it is quite clear that a valid licence cannot be given to perform an unlawful act. The local authority cannot change the nature of a highway. Once a highway, it is always a highway, and in any event if the local authority did give any permit or licence it can withdraw it at will, and the institution of the proceedings would be a withdrawal.

This was a finding by the justices out of sympathy. I also have every sympathy, but we have to administer the law. I am quite clear that an offence was proved, and the case must go back to the justices with a direction to convict. The penalty, of course, is a matter for them, but no doubt in all the circumstances it will be minimal.

**ASHWORTH J:** I agree.

**BROWNE J:** I agree.

*Case remitted.*

Solicitor: *K F B Nicholls, Ilford.*

G.F.L.B.



QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, ASHWORTH and BROWNE, JJ)

2nd November 1970

DONNELLY v ROWLANDS

*Trade Description—False description—Milk—Foil cap on bottle accurately describing milk and bearing retailer's name—Names of milk suppliers to whom bottle belonged embossed on bottle—Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1).*

The respondent, a retailer of milk, was charged on several informations with offering to supply milk to which a false trade description was applied, contrary to s 1 (1) (b) of the Trade Descriptions Act, 1968. The milk was in pint bottles each of which was closed by a foil cap legibly embossed with an accurate description of the milk, as required by the Milk (Special Designation) Regulations Act, 1963, and the respondent's name and farm address. The glass of the bottles itself was embossed with one of several names other than the respondent's own, which were names of well-known dairies or milk suppliers to whom the bottle belonged. Justices dismissed the informations, being of opinion that, as the true and correct trade description was to be seen on the cap, the false trade description on the glass was not false to a material degree within s 3 (1). On appeal by the prosecutor.

HELD, dismissing the appeal: the justices' approach to the issue was a possible one, but it was unnecessary to go to those lengths; in their context, the words on the bottle did not refer to the milk which had already been accurately described, but merely conveyed, as the fact was, that the bottle belonged to the person whose name was embossed on it; if the matter were looked at in that way, there was no falsity at all in the trade description.

Per CURLIAM. If there was a finding supported by evidence that members of the public were misled, and would, on reading the words embossed on the bottle, even though coupled with the foil cap, nevertheless think that the firms whose names were embossed on the bottles had something more to do with the production of the milk than merely being the owners of the bottles, there would be some ground for saying that there was a false trade description.

CASE STATED by Denbigh justices.

On 6th March 1970, four informations were preferred by the appellant, Leonard Donnelly, an inspector of Milk Vessels Recovery Ltd of Fawley Road, Tottenham, London N17, against the respondent, David Edward Rowlands, in the following terms, that on 4th February 1970 at Vale Street, Denbigh, he offered to supply 167 pint bottles of milk to which a false trade description was applied (the bottles being marked Northern), contrary to s 1 (1) (b) of the Trade Descriptions Act 1968; that on the same date and at the same place he offered to supply seven pint bottles of milk to which a false trade description was applied (the bottles being marked CWS), contrary to the same provision; that on the same date and at the same place he offered to supply three pint bottles of milk to which a false trade description was applied (the bottles being marked Express), contrary to the same provision; that on the same date and at the same place he offered to supply three pint bottles of milk to which a false trade description was applied (the bottles being marked Goodwins), contrary to the same provision.

On the hearing of the informations at Denbigh Magistrates' Court on 3rd April 1970 it was found that on the date and at the place alleged in the informations the respondent in the course of his trade or business as a milk retailer offered to supply 167 pint bottles of milk each of which was embossed with the word 'Northern', seven pint bottles of milk each of which was embossed with the letters 'CWS', three pint bottles of milk each of which was embossed with the word 'Express' and three pint bottles of milk each of which was embossed with the word

'Goodwins'; that the words and letters were visible and legible in each instance; that the 167 bottles embossed with the word 'Northern' were the property of Northern Dairies Ltd, that the seven bottles embossed with the letters 'CWS' were the property of the Co-operative Wholesale Society Ltd, that the three bottles embossed with the word 'Express' were the property of Express Dairies Ltd, and that the three bottles embossed with the word 'Goodwins' were the property of Goodwins Ltd; that the milk contained in the bottles on the date and at the place alleged in the informations had been placed in them by the respondent; that on the date and at the place alleged in the informations each of the bottles had a foil cap whereon it was embossed in legible words the following: Untreated milk. Produced from T.T. Cows. Rowlands, Plas Meifod, Henllan'; that the respondent in offering the bottles of milk on the date and at the place alleged in the informations when the bottles were embossed as hereinbefore set out had no intention of misleading the public; and that when the offences shown in the informations were pointed out by the appellant to the respondent, on 4th February 1970, the respondent said: 'I am waiting for bottles for my milk. I don't think Northern Dairies will mind because we get on well with each other'.

At the close of the appellant's case the respondent's solicitor submitted on his behalf on a question of fact that there was no case to answer on any of the charges. The justices rejected the submission. The respondent then elected not to give evidence himself and no evidence was called on his behalf. It was then contended on the respondent's behalf that, although he had offered to supply his own milk in bottles on which the words and letters were embossed as set out above, such words and letters did not constitute a trade description which was false to a material degree within the meaning of s 3 (1) of the Act. The respondent drew attention to the Milk (Special Designation) Regulations 1963, Sch 2, Part I, s C, para 1, which provided:

'Every bottle containing the milk in relation to which the special designation is used shall be tightly closed and shall be securely fastened either with a cap overlapping the lip of the bottle or in some other suitable manner approved by the licensing authority. The cap shall bear the address of the premises at which the milk is bottled and shall be conspicuously and legibly labelled or marked with the words "Untreated Milk" and it may also bear—(a) the day of production, with or without the word "morning" or "evening" according to the time of production; (b) the name of the licence holder by whom the milk was bottled; (c) the words "Produced from cows which have passed the tuberculin test"; and (d) subject to the approval of the licensing authority, the words "Farm Bottled" or "Farm Cartoned", as appropriate, if the milk has been bottled by the producer at the place of production. Except with the consent of the licensing authority, the cap shall bear no other words. If there is no cap on which the wording can suitably be placed, it shall be placed within a surrounding line in a prominent position elsewhere upon the bottle, and the foregoing provisions shall apply to the words within the surrounding line in the same way as they apply to words on the cap.'

On this basis the respondent contended that the true trade description of the milk was indicated by the wording on the cap on each bottle, and not by the words embossed on the side of the bottle.

It was contended on behalf of the appellant that the trade description embossed on each of the bottles was a trade description which was false to a material degree, and that the words 'to a material degree' in s 3 (1) of the Act referred to the falsity of the trade description as opposed to the effect of the falsity.

The justices were of the opinion that, as the true and correct trade description was to be seen on the cap on each of the bottles, the false trade descriptions contained in the words and letters hereinbefore mentioned were not false to a material degree. They accordingly dismissed the informations and the prosecutor appealed to the Divisional Court.

*H E P Roberts* for the appellant.

The respondent did not appear.

**LORD PARKER CJ** stated the facts and continued: The justices held that as the true and correct trade description was to be seen on the cap on each of the bottles, the false trade descriptions contained in the words and letters on the bottles were not false to a material degree, and accordingly they dismissed the informations. The relevant sections of the Trade Descriptions Act 1968 provide:

'1. (x) Any person who, in the course of a trade or business . . . (b) supplies or offers to supply any goods to which a false trade description is applied; shall . . . be guilty of an offence. . . .

'2. (1) A trade description is an indication, direct or indirect, and by whatever means given, of any of the following matters with respect to any goods or parts of goods, that is to say . . . (i) person by whom manufactured, produced, processed or reconditioned . . .

'3. (1) A false trade description is a trade description which is false to a material degree.

'(3) Anything which, though not a trade description, is likely to be taken for an indication of any of those matters and, as such an indication, would be false to a material degree, shall be deemed to be a false trade description . . .

'4. (1) A person applies a trade description to goods if he—(a) affixes or annexes it to or in any manner marks it on or incorporates it with . . . (ii) anything in, on or with which the goods are supplied . . .

It was said that in these circumstances both before the justices and in this court that here there was an offer to supply goods, that the inscriptions on the bottles CWS. Northern, Express or Goodwins were false trade descriptions and were false to a material degree, and that the fact that the words were on a container did not by reason of s 4 make the description any less a description of the goods.

As I see it, the justices here approached the matter by looking at the whole of the description on the bottles. The whole of the description on the bottles consisted of the wording on the foil cap and the embossed wording. What I think the justices were saying was, if one looks at the whole thing, the falsity contained in the embossed words on the bottles was not a falsity to a material degree bearing in mind the accuracy of the trade description on the foil cap. In my judgment, that is a possible approach, although I find it quite unnecessary to go to those lengths. It seems to me that such trade description as there was was not false in any degree. The words on the foil cap were an accurate trade description of the milk, and in their context the words on the bottle did not refer to the milk which had already been accurately described, but merely conveyed, as the fact was, that it was a bottle belonging to the person whose name was embossed. Looked at in that way, which is the ordinary way that any member of the public would look at it, there was no falsity here at all in the trade description.

Of course, if there was a finding supported by evidence that members of the public were misled, and would, on reading the embossed words, even though coupled with the foil cap, nevertheless think that CWS, Express or the like had had

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<b>ROAD TRAFFIC</b> – Driving while disqualified – Outstanding offences taken into consideration – Similar offence. <b>R v Jones</b> .. .. .	CA	36
<b>ROAD TRAFFIC</b> – Driving with blood alcohol proportion above prescribed limit – Arrest without warrant – Powers of police to detain thereafter – Road Safety Act, 1967, ss 1, 2 (2), 2 (4), 3 (1), 4. <b>R v Mackenzie</b> .. .. .	Assizes	26
<b>ROAD TRAFFIC</b> – Driving with blood alcohol proportion above prescribed limit – Provision of specimen – Blood – Analysis by ordinary equipment and skill – Gas chromatography. <b>Smith v Cole</b> .. .. .	QBD	97
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – Specimen for laboratory test – Failure to supply – Reasonable excuse – Excuse relating to blood specimen only – Liability to supply specimen of urine – Direction to jury – Road Safety Act, 1967, s 3 (3) (6). <b>R v Harling</b> .. .. .	CA	29
<b>TOWN AND COUNTRY PLANNING</b> – Permission – Refusal – Authority required to purchase land – Compensation – Assessment. <b>Margate Corporation v Devotwill Investments Ltd</b> .. .. .	HL	19
<b>TRADE DESCRIPTION</b> – False description – Milk – Foil cap on bottle accurately describing milk and bearing retailer's name – Names of milk suppliers to whom bottle belonged embossed on bottle – Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1). <b>Donnelly v Rowlands</b> .. .. .	QBD	100

something more to do with the production of the milk than merely being the owner of the bottle, then there would be some ground for saying that there was a false trade description. For my part I can find here no false trade description whatever, and accordingly, although for rather different reasons, I would dismiss this appeal.

**ASHWORTH J:** I agree.

**BROWNE J:** I agree.

Solicitors: *Lovell, Son & Pitfield, for Walker, Smith & Way, Chester.*

*Appeal dismissed.*

T.R.F.B.

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### WINCHESTER ASSIZES

(TALBOT, J)

29th July, 1970

BRITISH SCHOOL OF MOTORING LTD v SIMMS AND ANOTHER, STAFFORD  
THIRD PARTY

*Road Traffic—Driving test—Duty of examiner appointed by Ministry.*

Per TALBOT, J.: The duty of a driving examiner appointed by the Ministry of Transport to test the driving of a candidate for a full driving licence is to examine and test the driving of the candidate. He must observe, record, and use his discretion in deciding whether or not the candidate is fit to hold such a licence. In order properly to make the test he must not interfere with the driving, it being his duty to observe whether mistakes are made, and, if mistakes are made, whether they are of sufficient gravity to fail the candidate. He is not, therefore, in the position of a driving instructor or of a passenger supervising a learner, who is there to correct any mistake as soon as possible. The examiner is there to observe whether or not mistakes are made. To satisfy himself as to that in most cases he has to allow the mistakes to be made. When an examiner is faced with an emergency which arises suddenly through the action of the candidate he must take such steps as appear reasonable to him in the sudden rising of the emergency. If the steps he takes turn out to be wrong ones the law does not demand that, in the absence of rashness on his part, he should be held to be negligent.

ACTION by the plaintiffs, the British School of Motoring Ltd, claiming damages against the first defendant, Margaret Frances Simms, and the second defendant, Cyril Bernard Cooper, for damage to a motor car received in a collision between three cars. The first defendant joined A R Stafford, trading as the Mini Countryman School of Motoring, as a third party, claiming from him an indemnity against liability in respect of a counterclaim against the first defendant by the second defendant.

*W E Barnett* for the plaintiffs.

*M R Selfe* for the first defendant.

*H J M Tucker* for the second defendant.

A R Stafford did not appear.

**TALBOT J:** These proceedings arise out of a collision between three motor cars that took place on 31st October 1968. One Mrs. Drew was driving along Cleveland Road, Bournemouth, approaching the junction of that road with Wyndham Road where there are signs that traffic on Cleveland Road should give way to traffic on



Wyndham Road and also 'give way' lines at the mouth of Cleveland Road. Mrs. Drew stopped at the junction with Wyndham Road. She was undergoing a driving test in a motor car owned by the plaintiffs. Coming from the opposite direction was another test car driven by the first defendant. She also was undergoing a driving test, and the driving examiner was the second defendant. Coming along Wyndham Road from an easterly direction, that is to say, from the left of the first defendant, was a Ford Galaxy motor car driven by a Mr Fisher.

What happened so far as the first defendant is concerned, as I find on the facts, was this. She had come into Cleveland Road from another road about 70 or 80 yards from the junction with Wyndham Road, turned left into Cleveland Road in bottom gear and then accelerated along Cleveland Road, changing up into second gear. It may be, I am not really sure about this, that she got also into third gear, but I do not think that it matters. It is quite plain to me that she did not observe the 'give way' sign, nor did she take any notice of, if she observed them, the dotted white lines across the mouth of Cleveland Road. She, without pausing but driving at something under 20 mph, went straight into the junction and almost immediately she became aware of Mr Fisher's car bearing down on her from the left. She immediately accelerated. Meanwhile the second defendant, who was sitting by her side in the passenger seat of the dual-controlled test car, also became aware of Mr Fisher's car. At some stage he applied the brake, sensing the danger. The result was that the test car came to a stop when it had passed over the first half of the road and got into the second half of Wyndham Road. There followed a collision between Mr Fisher's car on the nearside front and the extreme nearside rear of the test car. That caused the test car to spin completely round so that it came into contact with the plaintiffs' stationary car and caused damage in respect of which the plaintiffs made their claim.

One of the issues was whether or not the second defendant told the first defendant to stop when he sensed the danger. I have reached the conclusion that, while I am quite sure that he honestly believes that he did tell her to stop, he did not in fact do so. I reach that conclusion on the facts in this way. The first defendant has no recollection that he ever told her to stop. Secondly, when the second defendant made his report, as he was required to do, of what occurred to his superiors, it can be seen from that report that there was no reference at all to the fact that he had told her to stop. Furthermore, it would appear from the evidence that the first defendant had correctly obeyed other instructions to pull into the side and on one occasion to make an emergency stop when told to do so. In those circumstances I have reached the conclusion as I have already stated on this point. Those are the bare facts of the accident.

I deal now with the question of liability. First, as regards the first defendant, the fact that she failed to notice, or, if she did notice, to obey the 'give way' sign, was clearly, in my view, an act of negligence. Furthermore, the fact that she drove into and over the junction without having regard to other traffic which might be approaching along the more important road, again clearly was an act of negligence.

The main issue here is whether or not the second defendant was also guilty of negligence in that he applied the test car's brakes so that it stopped and the collision resulted. What was alleged against him in the first defendant's original defence was that he applied the brakes when the first defendant was proceeding across Wyndham Road thereby causing the test car to stop in the path of Mr Fisher's car. The plaintiffs eventually joined the second defendant as a defendant. They alleged that he failed to supervise or control the first defendant's driving, failed to keep a proper look-out and heed the presence or position of Mr Fisher's car, failed to pay any proper regard to the 'give way' sign or dotted white lines or to the fact that the first defendant had not paid sufficient regard to them, failed to take control of the test car

or the brakes soon enough, applied the brakes when it was unsafe, and stopped the test car in the path of Mr Fisher's car. I think that a proper conclusion for me to arrive at is that the second defendant applied the brakes when he sensed that real danger was about to take place. At the particular time there was, on the forecourt of some industrial premises which adjoin Cleveland Road and Wyndham Road and on the left of the test car, a large pantechnicon van which obscured the visibility to the left up Wyndham Road. I am satisfied that he appreciated the danger as the test car was quite plainly going across the road. It must have been almost immediately following on that that he became aware that there was in fact danger, namely, the danger of Mr Fisher's car coming on the left. Does that action on his part result in a finding of negligence against him, negligence which partly or wholly caused this accident?

The second defendant, as I have said, was a senior driving examiner appointed by the Ministry of Transport to undertake the driving test of those who submit themselves for it in accordance with the statutory requirements. I have not examined the regulations and I am told that there would be no purpose in doing so because there is nothing in the regulations that defines his position or his duties. His duties, however, are plain. He is there to examine and test the driving of the subject who submits himself or herself for the test. He must observe, record and use his discretion in deciding, having seen what he has seen, whether or not the subject is fit to hold a full driving licence. In order properly to make a test of any subject or candidate, he must not interfere with the driving, it being his duty to observe whether or not mistakes are made, and, if mistakes are made, whether they are of sufficient gravity to fail a candidate. He is not, therefore, in the position of a driving instructor or of a passenger supervising a learner, who is there to correct any mistake as soon as possible. He is there to observe whether or not mistakes are made. In order to satisfy himself as to that in most cases he has to allow the mistakes to be made. It is laid down as part of the instruction for driving examiners in the Ministry of Transport manual that examiners should not operate or adjust controls or fittings of a test vehicle even at the candidate's request except where it is essential in order to avoid danger to the public. If it is necessary for me to express any opinion on that for the purpose of deciding this case, I do so. In my judgment, that is a proper instruction to give to driving examiners.

Let me now, therefore, examine it. His duty is not to interfere except when it becomes necessary to do so in the interest of public safety and the safety of himself and the candidate driving the motor car. In those circumstances, I do not think that the allegations made against the second defendant in the pleadings which allege that he failed to supervise or control the first defendant and the other allegations that I have mentioned are well founded. There remains the essential one on which the first defendant relies in her defence, that the second defendant was negligent in applying the brakes when he did, thus causing the test car to stop in such a position that Mr Fisher's car just collided with it at the rear. I have had cited to me the well-known cases of *Jones v Boyce* (1) and *The Bywell Castle* (2). It is quite plain that when an examiner is faced with a position of emergency that arises suddenly he must take such steps as appear reasonable to him in the sudden rising of the emergency. If the steps that he takes turn out to be the wrong ones, then the law does not demand that in those circumstances he should be held to be negligent. The expression so often used is 'an act taken in the agony of the moment'. Where such act is taken in the agony of the moment and it happens to be the wrong one, that does not mean that he becomes liable for his act. He would become liable if it was

(1) (1816), 1 Stark 493.

(2) (1879), [1874-80] All ER Rep 819; 4 PD 219.

rash. If it was an act which in the agony of the moment he might reasonably take, which he would not have taken had he become aware of all the circumstances, then he is not to be held liable for it. The second defendant was faced with this sudden emergency. It was not for him to stop the first defendant as she was approaching the cross-roads, or to tell her to slow down. He was to observe how she dealt with the situation. Only when it became quite plain that she was going to create danger did he, in the sudden emergency, take action. It would seem that he took the wrong steps. It would be, in my judgment, quite wrong, if not quite impossible, to have expected him in that fraction of a second to have decided whether or not it was safer to brake or to go on and whether or not the first defendant would go on. He did what I would have thought most passengers in a motor car in similar circumstances might have done if they had been in a position to do so, and that was to stop the vehicle.

In my judgment, therefore, I do not think it right on these facts to make any finding of negligence against the second defendant. That really deals with the submission made by counsel for the first defendant that her negligence had, as it were, come to an end and that the real and sole cause of this accident was the negligence of the second defendant. There was, in my opinion, no cessation in the causation of her negligence—her negligence caused the collision which caused the plaintiffs to suffer damage.

[His Lordship reviewed the medical evidence relating to the injuries suffered by the second defendant in the accident and awarded him damages against the first defendant.]

Another issue arises between the first defendant and the driving school to which she went and which owned the car she was driving. This claim is based on a breach of contract alleged to have been made between herself and the school. She went to the driving school, in order that she might receive driving lessons. She received lessons and eventually entered for the driving test. It was while she was driving the test car which belonged to the driving school that the accident happened. I am satisfied on the evidence which I have heard from the first defendant and her husband, as a result of what the driving school told her and her husband after the accident, that the test car was not insured for her to drive at the time of the accident. She, therefore, was unwittingly an uninsured driver. The result to her is that, she herself having judgment, as she will have shortly, entered against her for damages, will have to pay them rather than look to an insurance company to indemnify her. It is pleaded that there was an implied term, because there is no evidence of any express term, that she would be covered for all insurance purposes by the driving school during the time she was in a vehicle provided by them for her driving lessons and test. I am prepared to accept that in such a contract as this is, in the absence of any express condition, there is an implied term that such a person going to a driving school will be covered by insurance with regard to the car provided by the driving school. Therefore, there was a breach of contract by the driving school in providing her with a car which was not insured for her driving. She is entitled to damages which flow from that breach. The measure of those damages, in my opinion, is the damage she now has to pay which she would not have had to pay had she been properly insured.

Solicitors: *L Dawson & Co*; *Colin Bell & Co*, Bournemouth; *S M Gibson*, Bournemouth.

G.F.L.B.

**QUEEN'S BENCH DIVISION**

(LORD PARKER, C.J., ASHWORTH AND BROWNE, JJ)

28th October, 2nd November 1970

R v MUTFORD AND LOTHINGLAND JUSTICES. Ex parte HARBER

R v EAST SUFFOLK QUARTER SESSIONS. Ex parte HARBER

*Justices—Committal to quarter sessions for sentence—Application to change plea of guilty.*

Where a defendant has entered an unequivocal plea of guilty at a magistrates' court and has been committed to quarter sessions for sentence under either s 28 or s 29 of the Magistrates' Courts Act, 1952, and then applies for leave to change his plea, the proper court to hear and determine the application is the court of quarter sessions to which the defendant has been committed for sentence. Quarter sessions have jurisdiction to entertain the application, and if, on hearing the application, they refuse leave for a change of plea, that is the end of the matter, but, if they accede to the application, the proper course is for them to remit the case to the magistrates' court for trial on the basis of a plea of not guilty.

MOTION for orders of mandamus directed to East Suffolk Quarter Sessions or alternatively to the Mutford and Lothingland justices to hear and determine an application by Martin John Harber for leave to change his plea of guilty on a charge of theft of a cheque, contrary to the Theft Act 1968, s 1, and also on a charge of obtaining money by virtue of a forged endorsement on that cheque, to a plea of not guilty.

A J Arlidge for the applicant.

D H Penry-Davey for the quarter sessions and the justices.

*Cur adv vult*

2nd November. **LORD PARKER CJ** read the following judgment: On 11th March 1970, the applicant appeared before justices for the petty sessional division of Mutford and Lothingland ('the justices') when he pleaded guilty to a charge of the theft of a cheque, contrary to s 1 of the Theft Act 1968, and also to a charge of obtaining money by virtue of a forged endorsement on that cheque. These pleas of guilty were unequivocal pleas, and in due course after hearing the applicant's antecedents, the justices, in lieu of sentencing him, committed him to East Suffolk Quarter Sessions ('the quarter sessions') under s 28 of the Magistrates' Courts Act 1952 with a view to his being sentenced to Borstal training. On 20th March, before quarter sessions an application was made that the applicant be allowed to change his plea to one of not guilty. Quarter sessions, however, refused to hear and determine the application. Thereafter, on 1st April, a similar application was made to the justices who had committed him. The justices in turn refused to entertain his application, holding that they were *functi officio*.

It is in these circumstances that counsel for the applicant now moves for an order of mandamus directed to quarter sessions to determine the application that the applicant be allowed to change his plea; in the alternative he asks for an order of mandamus to the justices to hear and determine a similar application. These proceedings, therefore, raise the question whether there is jurisdiction in the case of a committal under s 28 of the Magistrates' Courts Act 1952, and, I would add, by parity of reasoning, under s 29 thereof, in either the magistrates' court or quarter sessions to entertain an application for a change of an unequivocal plea. This court is in no way concerned with the merits of the application, only with whether such an application can be entertained, and if so, by which court.

In the recent case in the House of Lords, *S (an infant) v Manchester City Recorder* (1), it was held that in trials before justices, just as in the case of trials before quarter sessions or assizes, the court has jurisdiction to entertain a change of plea, and, I

(1) 133 JP 3; [1969] 3 All ER 1230.

would add, of an unequivocal plea at any time until there is a final adjudication, i.e. until there has been a conviction in the broad sense of a finding of guilt or admission of guilt followed by sentence.

Their Lordships did not have cause to consider the position which arises in these proceedings where no one court is wholly responsible for all that leads up to the final adjudication. Indeed, several of their Lordships specifically excluded consideration of the matter. Thus LORD MACDERMOTT said:

'As to the first of these questions, the exercise of a complete criminal jurisdiction—and I use that expression to exclude special statutory procedures in which guilt is found by one court and punishment awarded by another—naturally falls into two parts, whatever the status of the court concerned.'

LORD MORRIS OF BORTH-Y-GEST said:

'There had been no judgment or final adjudication. Again, in *R v Norfolk Justices, ex parte Director of Public Prosecutions* (1) no question arose as to the withdrawal of a plea but the case is important as showing that (leaving out of account the procedure where s. 29 of the Act of 1952 is applicable and is properly followed) magistrates who try a case are not *functi officio* until they have passed a sentence or have otherwise finally adjudicated.'

Finally, LORD UPJOHN said:

'I would only add that your Lordships have not had to consider the complications caused by the statutory power of magistrates to send cases to a higher court for sentence—see for example *R v Riley* (2) and I express no opinion thereon.'

For myself, I approach this matter on the basis that it would be odd indeed if an accused who had a right to have an application for leave to change his plea determined at any time before final adjudication should lose that right merely because the final adjudication results from a hearing before two courts, or, as it can be said, before a composite court. Indeed I would not come to that conclusion unless forced to do so. As LORD MACDERMOTT pointed out in *S (an infant) v Manchester City Recorder* (3);

'The evidence relevant to the commission of an offence is generally relevant to the sentence. And that part of the hearing which is directed to the sentence may well cast new light on the question of guilt or innocence . . . But if, as can happen, the truth comes to light during the second stage of the proceedings, when the question of what to do with the accused is under consideration, why should it not be acted on and a changed plea of not guilty allowed where the interests of justice so require?'

It is of course true that justices before committing have to enquire into the case to decide whether to sentence themselves or to commit; but nevertheless there may be occasions when the further enquiries made on committal by quarter sessions will result, and properly result, in an application to change a plea.

What is urged here, however, is that the statutory provisions dealing with committals indeed produce this result. Thus in the case of a committal under s 28 of the Magistrates' Courts Act 1952 with a view to Borstal, quarter sessions come to deal with the case under s 20 of the Criminal Justice Act 1948. Section 20 (5) provides:

'Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say:—(a) the . . . court of quarter sessions

(1) [1950] 2 KB 558.

(2) 128 JP 85; [1963] 3 All ER 949.

(3) 133 JP 3; [1969] 3 All ER 1230.

shall inquire into the circumstances of the case and may—(i) if a sentence of Borstal training is available in his case under subsection (2) of section one of the Criminal Justice Act 1961, sentence him to Borstal training; or (ii) in any case, deal with him in any manner in which the court of summary jurisdiction might have dealt with him . . .’

It is undoubtedly true that the words ‘deal with him in any manner’ are on the face of them wide enough to cover anything which comes to light or falls to be done by quarter sessions. At the same time, it seems to me clear that the legislature did not have a situation such as this in mind, but were really giving quarter sessions all the necessary powers in relation to sentence, including orders such as probation, conditional discharge and the like, including, of course, any adjournment and inquiries involved in deciding what sentence to impose.

Similarly, when one comes to committal under s 29, the matter is dealt with by quarter sessions under s 29 (3) of the Criminal Justice Act 1948. That provides:

‘Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say:—(a) the . . . court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court . . . before which he had just been convicted of the offence on indictment . . .’

Again it can be said that those are very wide words which would enable quarter sessions to entertain an application of the kind in question in this case; but again as it seems to me those words are really, in their context, limited to all the steps necessary in and in relation to sentence. In saying that I have not forgotten that in *R v Grant* (1) LORD GODDARD CJ, in giving the judgment of the court, said:

‘In our opinion, that section clearly means that once an offender is committed for sentence to quarter sessions he is to be treated in all respects as though he had been committed for trial to quarter sessions and came before quarter sessions as a prisoner who has pleaded Guilty.’

In that case, however, the point in question was whether a notice setting out the qualifying convictions for a sentence of corrective training which had not been served while the matter was before the justices could be served when the matter was before quarter sessions. It was, therefore, a case dealing with matters leading up to the appropriate sentence to be imposed.

There is, therefore, at first sight much force in the argument that the position is different in the case of committals under ss 28 and 29. But it is, I think, important to ascertain the nature of the jurisdiction that exists in any court to allow a change of plea. This jurisdiction exercisable by assizes, by quarter sessions, by justices prior to final adjudication, is certainly not a statutory jurisdiction; rather as it seems to me it is inherent in the court dealing with the matter.

Again, if I may refer to the speech of LORD MACDERMOTT in *S (an infant) v Manchester City Recorder* (2), he put the matter in this way:

‘As respects trials on indictment, including trials before justices at quarter sessions, the attitude of the common law on this matter has been clear for generations. Such a change may, at the discretion of the court, be allowed at any time before the case has been disposed of by sentence. On principle, I

(1) 115 JP 36; [1951] 1 All ER 28; [1951] 1 KB 500.

(2) 133 J.P. 3; [1969] 3 All ER 1230.



see no reason why this discretionary power should be denied to courts of summary jurisdiction. It is as necessary there as elsewhere if the justices are to be free to do justice while they have seisin of the proceedings.'

In saying that LORD MACDERMOTT was, as it seems to me, following the view taken as to this jurisdiction in *R v Plummer* (1); it was a case which came before the Court of Crown Cases Reserved and was concerned primarily with the position in regard to a conspiracy charge when one alleged conspirator had pleaded guilty and the other alleged conspirator or conspirators had pleaded not guilty and had been acquitted. But in the course of judgment various passages dealt with this very matter. Thus WRIGHT J said:

'Another point is raised in this case, namely, whether the court had power to allow the appellant to withdraw his plea of guilty. There cannot be any doubt that the court had such power at any time before, though not after, judgment ...'

References were then made to *R v Clouter and Heath* (2), a case to which this court has also been referred. WRIGHT J went on:

'as we infer that but for the erroneous opinion that there was no such power the withdrawal would have been allowed, this might of itself be a ground for a venire de novo ...'

BRUCE J said:

'It is clear that the court has power to allow the appellant to withdraw his plea of guilty. The court no doubt had a discretion in the matter, and, if the court had exercised its discretion, it may be that that would be final and we should have no power to interfere with the exercise of its discretion. But the court, acting upon the erroneous opinion that it had no power to allow the withdrawal of the plea, never did exercise its discretion.'

JELF J agreed with LORD ALVERSTONE CJ, who said:

'On the second point, we entirely concur in the judgments of WRIGHT and BRUCE JJ. I desire to add that I agree with the view taken in those judgments as to the power of this court to make such order as justice may require.'

Once one realises that the jurisdiction to entertain a change of plea is not a statutory one, but is based on the inherent jurisdiction of any court to see that justice is done, one asks oneself whether the statutory provisions to which reference has been made in the case of committals have in respect of the two courts forming this composite court ousted their jurisdiction. In my judgment, those statutory powers clearly have not done so.

Accordingly, the next question arises as to what court in such a case has jurisdiction to entertain such an application. Having paid due attention to counsel's argument in the following case, it seems to me that common sense and convenience dictate that the jurisdiction should be exercised by the court having seisin of the matter—in this case the quarter sessions. True it is that in *R v Norfolk Justices, ex parte Director of Public Prosecutions* (3) it was held that a magistrates' court after committal for

(1) 66 JP 647; [1900-03] All ER Rep 613; [1902] 2 KB 339.

(2) (1859), 8 Cox CC 237.

(3) [1950] 2 KB 558.

sentence is not *functus officio* and accordingly it might be said that the justices had jurisdiction to entertain the application. However, when one looks at that case it was a case in which the committal turned out to be a nullity. The decision of the court was that the justices, notwithstanding that the committal could only be set aside on appeal or by an order of *certiorari*, nevertheless retained sufficient jurisdiction to sentence the accused once quarter sessions had found that the committal was a nullity.

As it seems to me, in the present case the respondent justices were right in refusing to entertain the application on the basis that, although the composite court had not arrived at a final adjudication, that part of the court which consisted of the justices had parted with their jurisdiction to the quarter sessions, at any rate so long as the committal remained a valid committal. Accordingly, it seems to me that the proper court to hear any such application is quarter sessions. Of course, if quarter sessions, after hearing the application, refuses it, that is an end of the matter. If, however, they accede to the application, then, as it seems to me, the proceedings up to that point including the committal fall, as it were, to the ground, and the proper course would be for quarter sessions to remit the case to the justices for trial on the basis of a plea of not guilty.

This court has been referred to a number of cases, none of which as it seems to me prevents us from coming to the above conclusion. *R v Riley* (1) was naturally much relied on by the prosecution; it was a decision of the then recorder of the Liverpool Crown Court. It was a decision prior to *S (an infant) v Manchester City Recorder* (2) and largely based on reasoning which did not appeal to their Lordships. Further, when one looks at it, one finds that it was an application to quarter sessions to remit the case to the justices to entertain the application for a change of plea. In my judgment that relief was properly refused on any view of the matter.

Again the court was referred to *R v Tottenham Justices, ex parte Rubens, R v Middlesex Quarter Sessions, ex parte Rubens* (3). In that case I ventured to express a tentative opinion that in the case of an unequivocal plea quarter sessions would have no jurisdiction to deal with the matter. After hearing further argument in the present case I am quite clear that I was wrong. Incidentally the view at which I have arrived in the present case avoids all the difficulties which were encountered in the *Tottenham* case when quarter sessions, in order to deal with the matter of the equivocal plea, gave leave to appeal and dealt with it as an appellate court and not in the committal proceedings.

Finally I would only add this. On the basis of my judgment herein there is clearly a danger, which indeed was foreseen by LORD GODDARD CJ in *R v West Kent Quarter Sessions Appeal Committee, ex parte Files* (4), that accused persons content to plead guilty and be dealt with by the justices, will endeavour to change their plea as soon as they realise that they are at the risk of greater punishment in the hands of quarter sessions on a committal. That, however, is a danger which no doubt will be borne in mind by any quarter sessions called on to determine an application for a change of plea. Indeed, when one realises that in such a case as this the applicant has remained silent through all the enquiries which have taken place before the justices decide whether to sentence or commit, and then only makes the application after the committal has been ordered, the cases must be comparatively rare in which it would be proper at that stage to allow a change of plea. The merits and the considerations of that are, however, for the quarter sessions when called on to entertain a change of plea.

(1) 128 JP 85; [1963] 3 All ER 949.

(2) 133 JP 3; [1969] 3 All ER 1230.

(3) 134 JP 285; [1970] 1 All ER 879.

(4) 115 JP 522; [1951] 2 All ER 728.

Accordingly, in the result I would refuse the order of mandamus to the justices, but I would direct a mandamus to go to the quarter sessions to hear the application for a change of plea.

**ASHWORTH J:** I agree.

**BROWNE J:** I agree.

*Order for mandamus.*

Solicitors: *Hatchett Jones & Co*, for *Gerard Dunne & Co*, Lowestoft; *M F C Harvey*, Ipswich.

T.R.F.B.

### HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON, LORD GUEST AND LORD DIPLOCK)

7th, 8th, 12th, 13th October, 15th December 1970

#### TREACY v DIRECTOR OF PUBLIC PROSECUTIONS

*Criminal Law—Blackmail—‘Makes an unwarranted demand’—Demand in letter written and posted in England to person abroad—Theft Act, 1968, s 21 (1).*

By s 21 (1) of the Theft Act, 1968: ‘A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes an unwarranted demand with menaces...’

A person commits an offence within this section if he writes and posts a letter in England unwarrantably demanding a sum of money from a person residing abroad and there receiving the letter.

So HELD by LORD HODSON, LORD GUEST, and LORD DIPLOCK, LORD REID and LORD MORRIS OF BORTH-Y-GUEST dissenting.

APPEAL by Eugene Anthony Treacy against an order of the Court of Appeal, Criminal Division, dismissing his appeal against his conviction at the Central Criminal Court of making an unwarranted demand with menaces with a view to gain for himself contrary to s 21 of the Theft Act 1968.

*M Graham* for the appellant.

*C P C Whelon* for the Crown.

Their Lordships took time for consideration.

15th December. The following opinions were delivered.

**LORD REID:** I shall not set out the facts of this case. The question in issue can be simply stated. The offence charged was the blackmailing offence of making an unwarranted demand with menaces. Is a person guilty of that offence if in England he writes and posts a letter making such a demand of a person who is abroad?

I think that the best way to approach this case is to consider first the converse case where the blackmailer goes abroad and writes and posts there his letter to his intended victim in England. Can he on his return to England be convicted of this offence? I cannot believe that it would be a good defence that all the physical acts which he did in order to make his demand were carried out by him abroad and that therefore the offence was committed abroad. Whether one takes into account the views of the man in the street or simply construes the words of s 21 of the Theft Act 1968, it seems to me to be quite plain that the blackmailer made his demand in

England when the intended victim received his letter. Any other decision would be, as has been said, a 'blackmailer's charter'.

First, I think we should see what is meant by making a demand with menaces. Rather than argue about words I shall take a few examples. Suppose the blackmailer uses the telephone and says: 'You know who is speaking. Pay up or I shall kill your brother John'. If the victim receives the message he will understand it, and clearly there is a demand with menaces. But suppose the blackmailer gets the wrong number. Sometimes an operator taking a call does not listen immediately and no one may hear these words. Or the call may be taken by a complete stranger. He does not know who the caller is or what is demanded, and he is not menaced; he has no brother John. It seems to me very far fetched to say that the blackmailer has made a demand with menaces. He has attempted to do so, but his attempt has miscarried.

Then suppose the blackmailer sends an emissary to make an oral demand. Surely no demand is made until the emissary delivers the message. Can it make any difference that the emissary carries a paper with the words written on it? Can it make any difference that the paper is enclosed in an envelope? Can it make any difference that the emissary does not know what is enclosed in the envelope? Can it make any difference whether the message is to be delivered in this country or abroad? I think not. But it is said to make a difference whether or not the blackmailer is able to get in touch with the emissary before the message is delivered and countermand its delivery. I can see no reason for that. In either case the blackmailer has done all the physical acts he can to put in train a series of events which if not interrupted will result in the demand being made. They may be interrupted by the emissary being taken ill or being unable to find the victim or by the blackmailer having second thoughts and being able to countermand delivery. The result is the same in each case. The blackmailer attempted to make the demand when he despatched the emissary, but the demand was never made. The post office is no more than an emissary. The letter may miscarry or the addressee may have left his old address. The letter may or may not be returned by the post office to the sender.

Some difficulty has been introduced into this matter by what was said in *R v Moran* (1) when it was said that there could not be an attempt to make a demand. There may have been no room in that case for finding an attempt. But if it was intended to say that there can never be an attempt to make a demand with menaces I think that that was clearly wrong. So in this case I have no doubt that a demand with menaces was made by the appellant when the victim received the letter in Germany, but no demand was made in England.

How, then, was he guilty of an offence in this country? He did not make two demands, one when he posted the letter and a second when it was delivered. He did nothing after posting the letter which could amount to a second demand. But it was argued that he made a continuing demand which began when he posted the letter and ended when it was received. Continuing offences are well known in the law. They are generally offences of omission. The accused is guilty of the full offence at the beginning and he continues to be guilty for every moment during which the omission continued. But, here, was the appellant guilty of the full offence when the letter was posted? Would he, in the examples which I have suggested, have been guilty of the full offence the moment he sent off his emissary? I think not. I therefore reject the argument that there was a continuing demand.

The particulars of the offence of which the appellant was convicted were that he:

'... on the 1st day of July 1969 within the jurisdiction of the Central Criminal Court, with a view to gain for himself, made an unwarranted demand ... with menaces.'

1st July was the day when he posted the letter in England. If I am right that the demand was not made until the letter was received in Germany then that is an end of the case.

But there was much argument on a wider basis involving the jurisdiction of the courts of England when there is a foreign element in the crime. My noble and learned friend, LORD MORRIS OF BORTH-Y-GEST, has dealt with this matter. I agree with what he says and shall not repeat it. But in view of the importance of the question I shall try to state my own views briefly. It has been recognised from time immemorial that there is a strong presumption that when Parliament, in an Act applying to England, creates an offence by making certain acts punishable, it does not intend this to apply to any act done by anyone in any country other than England. Parliament being sovereign is fully entitled to make an enactment on a wider basis. But the presumption is well known to draftsmen, and where there is an intention to make an English Act or part of such an Act apply to acts done outside England that intention is and must be made clear in the Act. I can find no indication of any such intention in the Theft Act 1968 with regard to any part of it with which we are concerned. I think that it would be both retrograde and likely to cause confusion in the law if any such intention were inferred without there being clear words to indicate it.

The present state of the law is, in my view, far from satisfactory. I refer in particular to the decisions in *R v Harden* (1) and *R v Brixton Prison Governor, ex parte Rush* (2). If a person in this country does all that he can to ensure that a crime is committed abroad so that he can reap the benefit here, I can see nothing contrary to legal principle in our law holding him guilty of a crime. If I were entitled to make law I think I would draw some distinction between *malum prohibitum* and *malum in se*. The latter is or ought to be a crime everywhere but opinion and practice differ as to the former. But changes of that kind are apt to have side effects which would elude us in any such examination of a problem as we can make in reaching a decision in a particular case.

This is not an offence where there are two elements, eg, making a false pretence and then obtaining the money. There is only one element in this offence—making a demand with menaces. But by employing the services of the post office the appellant chose to arrange matters so that he personally did not make the demand; he only had to do the acts preparatory to committing the offence—writing and posting the letter. If I take the law as it is the argument must be that, on a proper construction of the Theft Act 1968, doing the preparatory acts in England can be held to be equivalent to making the demand in England. This seems to me to be a novel and unsound construction. No doubt there ought to be an offence. And I think there would have been an offence under the law as it was before the Theft Act 1968 was passed. Those who prepared that Act tried to simplify the law. But very often the result of simplifying the law is that *per incuriam* some unusual cases are no longer caught by the simplified provisions. In such a case it is, in my view, wrong to try to remedy this by giving a strained meaning to the new provisions. The proper remedy is new legislation. I would allow this appeal.

**LORD MORRIS OF BORTH-Y-GEST:** The general principle of the common law of England is that the exercise of criminal jurisdiction does not extend to cover acts committed on land abroad. In general, therefore, acts committed out of England, even though they are committed by British subjects, are not punishable under the criminal law of this country. But as Parliament is supreme it is open to

(1) 126 JP 130; [1962] 1 All ER 286, [1963] 1 QB 8.

(2) 133 JP 153; [1969] 1 All ER 316.

Parliament to pass an enactment in relation to such acts. It is, however, a general rule of construction that unless there is something which points to a contrary intention a statute will be taken to apply only to the United Kingdom. It would be open to Parliament to enact that if a British subject committed anywhere an act designated as blackmail he would commit an offence punishable in England. Such an enactment would, however, have to be in clear and express terms: specific provision would have to be made in regard to acts committed abroad. The general rule as expressed by LORD HALSBURY LC in *MacLeod v A-G for New South Wales* (1) is that 'all crime is local' and that jurisdiction over a crime belongs to the country where it is committed. Unless, therefore, there is some provision pointing to a different conclusion, a statute which makes some act (or omission) an offence will relate to some act (or omission) in the United Kingdom. Even where a statute creating a criminal offence is clearly expressed so as to cover acts committed outside the jurisdiction, it will in the absence of further clear provision only be regarded as covering such acts when committed by British subjects.

'One other general canon of construction is this—that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting.'

(Per LORD RUSSELL OF KILLOWEN CJ in *R v Jameson* (2).)

There are numerous statutes which have made express provision in relation to acts committed abroad by British subjects and which have made such acts punishable in this country. It will suffice to give only a few examples. Thus, by s 9 of the Offences against the Person Act 1861, it was provided that where any murder or manslaughter

'shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without and whether the person killed, were a subject of Her Majesty or not'

then any such offence if 'committed by any subject of Her Majesty' could be dealt with, inquired of, tried, determined and punished in England. Section 10 of that Act made provision for the case where any person 'being criminally stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England' should die in England and for the case where someone criminally stricken, poisoned or otherwise hurt in England should die of the same at sea or at any place out of England the offence could be dealt with in England. In s 8 of the Perjury Act 1911 provision is made to allow of a prosecution in England where an offence is 'committed in any place either on sea or land outside the United Kingdom'. By s 57 of the Offences against the Person Act 1861 it was enacted that whosoever being married should marry any other person during the life of the former husband or wife and 'whether the second marriage shall have taken place in England or Ireland or elsewhere' should be guilty of bigamy. One part of the proviso to the section enacted that it would not extend to a second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty. By s 31 of the Criminal Justice Act 1948 it is provided that any British subject employed under Her Majesty's Government in the United Kingdom in the service of the Crown who commits, in a foreign country, when acting or purporting to act in the course of his employment, any offence which, if committed in England, would be punishable on indictment, is to be guilty of an offence and subject to the same punishment as if the offence had been committed in England. Without

(1) [1891] AC 455.

(2) 60 JP 662; [1896] 2 QB 425.



further elaboration it will suffice to quote the words of VISCOUNT SIMONDS in *Cox v Army Council* (1):

'apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England.'

The appellant was charged with an act that is made an offence by s 21 of the Theft Act 1968. That is an Act to revise the law of England and Wales as to theft and similar or associated offences and in connection therewith to make provision as to criminal proceedings by one party to a marriage against the other 'and to make certain amendments extending beyond England and Wales in the Post Office Act 1953 and other enactments'. The Larceny Act 1916 is (subject to one limitation not here relevant) wholly repealed.

The offence of blackmail is created and defined in s 21. Certain conduct had been punishable under ss 29 and 30 of the Larceny Act 1916: such conduct had not in that Act been designated by the name 'blackmail'. The offence of blackmail is committed if a person (with a view to gain for himself or another or with intent to cause loss to another) 'makes any unwarranted demand with menaces'. I can see no trace of any words which would warrant a suggestion that Parliament was making it an offence punishable in England for a person to make an unwarranted demand with menaces abroad. Nor did the prosecution ever so contend. They only claimed to prosecute the appellant in respect of what he did in this country. They contended that what he did in this country was made an offence by s 21. They did also advance a contention, which though obscure I must examine, that if the act of the appellant could be said to consist of substantial elements in this country and of substantial elements in Germany then there could be a conviction in this country and also (depending presumably on German law) in Germany.

In my view, the only question that arises in this appeal is whether the appellant made a demand in England or whether he made it in Germany. He posted in England a letter which he had written and which was received in Germany by someone to whom it was addressed and who was living at the address to which the letter was sent. The terms of the letter were such that there was an 'unwarranted demand with menaces': the appellant was motivated by 'a view of gain for himself'. The letter was dated 29th June 1969. It was posted on 1st July 1969 in the Isle of Wight. The letter read:

'29-6-1969

John Jones, 101 Star St.  
c/o, Paddington  
London W.2

Dear [Mrs X],

This is a note asking for the loan of one hundred and seventy five pounds (£175) in return for keeping my mouth shut about you and Kane. If the money does not arrive [sic] by the 10th July, I will send the photos of you and Kane to your husband Rod at Liverpool. I just want one payment of £175 in an ordanry [sic] letter sent to

Remember 10th July

John Jones.  
c/o 101 Star St.  
Paddington  
London W.2.'

Deadline

The appellant was indicted for the offence of blackmail contrary to s 21 of the Theft Act 1968. The particulars of the offence were as follows:

(1) [1962] 1 All ER 880; [1963] AC 48.

'Eugene Anthony Treacy on the 1st day of July 1969 within the jurisdiction of the Central Criminal Court, with a view to gain for himself, made an unwarranted demand of the sum of £175 from [Mrs X] with menaces.'

The appellant was tried at the Central Criminal Court. He pleaded not guilty. On the third day of the trial a submission was made that the court had no jurisdiction to try the case. It was contended that no offence had been committed in England. The court ruled that the demand was complete and was made when the irrevocable step was taken of posting the letter. It was held that it was not an essential ingredient of the offence of blackmail that 'the demand should have been received by the victim'. The trial proceeded for two more days. On the fifth day of the trial the appellant changed his plea to one of guilty while preserving his objection that his offence was committed outside the jurisdiction of the court.

On appeal, the Court of Appeal upheld the ruling of the learned judge at the trial that the offence was complete 'when the last irrevocable step is taken in the making of the demand'. It was held that the offence was committed and the demand completed when the letter was posted. It was said that if for any reason the letter had gone astray and had not been received the demand would still have been made. The view was further expressed that it might be right to regard the demand as continuing until it were received or as repeated when received.

'On that view the appellant's demand was made both in England and in Germany, but he would still be triable for the offence in England although he might also be triable for an offence in Germany.'

My Lords, I am unable to agree with this approach. The short question which arises is whether the appellant made an unwarranted demand with menaces in England. The offence is committed (other words of s 21 being satisfied) if a person 'makes any unwarranted demand with menaces'. The act which is made an offence involves the making of a demand. How, then, does a person make a demand? He does so by communicating a request. He may do this by speaking to someone. He may do it in other ways. But the notion of making an unwarranted demand with menaces involves that the demand is made to or of someone who could comply with it and who could be influenced by the menaces that accompany the demand. The act of making the demand is not, in my view, committed until it is communicated to the person who is being unjustifiably menaced. There must be contact between the demander and the victim. If the demander puts his menacing demand into writing and trusts to the post either in this country or in some other country to deliver it to his victim he will not have made his demand unless and until his letter arrives. The making of a demand is one act which takes place at one time. If an Englishman on a day trip to France there posts to a place in England a letter containing an unwarranted demand of the addressee of the letter who in due course receives it at his address in England, I consider that the demand is then and at that place made.

I find it wholly unrealistic to suggest, as does the Crown, that a demand is made when a letter containing a demand is posted. Section 21 does not make it an offence to post a letter which contains an unwarranted and menacing demand. Such an offence might have been created but it has not been. The offence under s 21 consists in making a demand. It is said in the present case that the appellant made his demand on 1st July when he posted his letter in the Isle of Wight. On that date Mrs X was in no way exercised to consider whether or not she should send a sum of £175. On that date she was disturbed by no menaces. If the letter had been lost in the post she would have been oblivious of its contents. The letter did later reach her but if after 1st July and before it did reach her she had been asked whether the appellant

had made an unwarranted demand with menaces she would assuredly have said that he had made no demand at all.

If a person went on to a remote and deserted shore and spoke words involving an unwarranted demand with menaces it would be fanciful to suggest that he had committed an offence under s 21. If a person put such a demand into writing in a letter which he then posted to an address in England and if after the letter was posted but before it was delivered the addressee of the letter died, I cannot think that it would be right to say that the demand was made. There would, I think, have been an attempt to make a demand. Making a demand or demanding involves effecting contact with a person so that effective communication is established with him. A demand is not made until it is communicated. If the demand is contained in a letter it is not made until the letter is received. If the appellant had decided to go over to Germany and there to confront Mrs X and to require her to pay him money, he would not have made his demand until he confronted Mrs X. If he had decided to send a friend to present to Mrs X on his behalf his requirement, he would not have made his demand until his friend had completed his mission. If he had decided to write out his request and personally to take his letter so as to present it to Mrs X, he would not have made his demand until he had seen Mrs X and handed over his letter. If he had entrusted his letter to a friend to take it to Mrs X in Germany and if the friend had accepted the mission and set out on the journey in such manner that precluded his being recalled I would think it strange indeed to say that the appellant had made a demand with menaces when he said farewell to his friend. Nor do I think that anyone so placed would ever think that he had made a demand. His menaces would not have begun to operate. They would only do so when the demand was made. If the friend died on the journey some new plan would have had to be made, for then there would have been no demand.

As the present case only involves and requires a consideration of the meaning of the words of s 21 I do not find it necessary to refer to cases in which, in regard to quite different offences, there has been discussion as to the place where an offence has been committed. There have been many cases in which consideration was given to the question where the offence of obtaining goods or money by false pretences was committed. In such cases there might be a false pretence in one place and an obtaining in another. The act of making a false pretence would precede the act of obtaining. Under s 21 there is no comparable problem. There is but one criminal act, i.e., the act of making the demand. There is no provision in the section covering the doing of an act in one place with some consequences elsewhere. Nor is there scope for or value in speaking about the 'gist' of the offence. The gist is in making the demand. There must be the necessary intent and the demand must have the qualities described in the words of the section, but the offence consists in making the demand. That is a single act taking place at one time and in one place. I cannot therefore accept the contention of the prosecution that the act of the appellant can be said to have consisted of substantial elements in this country and substantial elements in Germany. There is nothing in the section to warrant the suggestion that the posting of a letter is a 'constituent element' of the offence. Nor can I accept the view that the appellant's demand was made both in England and in Germany. There were not two demands. There was only one. It is, in my view, wholly artificial to say that the appellant made a demand in England on 1st July and then made the same demand again or a separate demand in Germany some days later. Nor can there be any question of a continuing offence. The offence was committed when the demand was made. As in my opinion the demand was made in Germany when Mrs X received the threatening and demanding letter, I consider that under the law as it now stands, even though it may be unsatisfactory and merit examination, the court lacked jurisdiction. For the reasons which I have given I would allow the appeal.

**LORD HODSON:** The argument before your Lordships travelled over a very wide field in which many circumstances were considered which do not arise in this case and persuasive arguments were used on both sides as to the difficulties and doubts which might arise in other cases, whichever view was accepted of the two alternatives put forward. The only question which it is necessary for your Lordships to decide is: 'What is the construction to be placed on s 21 (1) of the Theft Act 1968?' The subsection provides:

'A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces . . .'

The specific words to be construed are 'makes any unwarranted demand'.

The Theft Act 1968 replaced the Larceny Act 1916, which it repealed, with one immaterial exception. Section 29 (1) of the earlier Act provided:

'Every person who—(i) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing . . . shall be guilty of felony . . .'

The short facts of this case are these. On 1st July 1969, the appellant posted in the Isle of Wight a letter written by him and addressed to Mrs X in Frankfurt, Germany. The letter read:

'This is a note asking for the loan of one hundred and seventy five pounds (£175) in return for keeping my mouth shut about you and Kane. If the money does not arrive by the 10th July, I will send the photos of you and Kane to your husband Rod at Liverpool. I just want one payment of £175 in an ordinary letter sent to—John Jones c/o 101 Star St. Paddington London W.2. Remember 10th July Deadline.'

The change of language in the later Act enabled the appellant to put forward an argument which would not have been available to him under the 1916 Act, for he says that he can rely on the general principle of English criminal law that no conduct constitutes an offence unless it occurs in the territory of England. In the absence of express statutory provision to the contrary, Acts of Parliament must be so construed as not to conflict with this principle. He argues that no demand was made in England, but that the demand was not made at all until Mrs X received it in Frankfurt.

Under the 1916 Act there would have been no question but that the letter demanding the money was uttered in England and no doubt as to the justice of the appellant's conviction could be felt. Now the relevant words are changed to 'makes any unwarranted demand' so he says: 'True, I wrote a letter initiating a demand but no demand was made and ergo no crime was committed until the letter reached its destination in Germany'. Hence the statutory offence of blackmail, which to be justiciable must be committed in this country, was, he says, not committed by him at all. This seems an odd consequence of an Act designed to revise the law of England as to theft and similar or associated offences and I do not find myself able to accept that the result for which the appellant contends follows.

Some learning has been expended in dividing the commission of a crime into its initiatory and its terminatory stages. This forms the basis for an argument that the crime is not completed until the terminatory stage is reached. This was not reached until the letter reached its destination outside the jurisdiction. Similarly, an argument can be built on a distinction between conduct leading up to a result and the result itself. Thus, in obtaining money by false pretences, the conduct which is essential to the crime does not amount to a complete offence until the result is obtained. So

in this case the writing of the letter and the posting of it by the appellant is said to be no more than a preparatory act, at worst an attempt to commit the crime of blackmail. Under the 1916 Act, the wording of which I have quoted, it was held that there cannot be an attempt to demand money with menaces. In short, either there is a demand or there is not; a person cannot be guilty of an attempt to demand: *R v Moran* (1). This is correct as a general rule if the view I take as to the meaning of the phrase 'makes a demand' is right. It is, of course, otherwise if, under the 1968 Act, the demand is not made until it reached its destination; then there could be an attempt to demand in the preparatory stages, culminating in the perfection of the crime when the demand was received.

I see nothing improbable in Parliament in 1968 enacting that the conduct of the appellant in writing and posting a threatening letter should be punished as a criminal offence even without proof that the letter was received in this country. It had so enacted in 1916. It has been argued that this view of the construction of the Act gives a blackmailer a charter if he takes the trouble to cross the Channel and post his letter to a recipient in this country. I do not agree, but it is unnecessary to consider such a case which might involve deciding whether a demand made outside the jurisdiction could be treated as a continuous demand subsisting until the addressee received it.

I am in agreement with the Court of Appeal that the criminal offence of blackmail was committed in that the appellant made a demand when he wrote and posted this letter to Mrs X. I would therefore dismiss the appeal.

**LORD GUEST:** I have had the advantage of reading the speech of my noble and learned friend, LORD HOBSON. I agree with his views and for the same reasons would dismiss this appeal.

**LORD DIPLOCK:** The appellant wrote and posted in England a typical blackmailing letter addressed to a lady in West Germany. In it he demanded that she should send £175 to him at an address in England under the threat that if she did not he would inform her husband of some allegedly discreditable conduct on her part. She received the letter in West Germany, the police in England were informed, and the appellant was arrested in this country and tried and convicted at the Central Criminal Court of the offence of blackmail under s 21 of the Theft Act 1968.

His conviction was upheld by the Court of Appeal who granted leave to appeal to your Lordships' House and certified that the following point of law of general public importance was involved in the decision:

'Whether, when a person with a view to gain for himself or with intent to cause loss to another makes an unwarranted demand with menaces by letter posted in England and received by the intended victim in West Germany, the person can be tried in England on a charge under s 21 of the Theft Act 1968.'

In view of the way in which the question is framed and the wide-ranging argument about 'jurisdiction' before your Lordships' House, I am prompted to state at the outset that the question in this appeal is not whether the Central Criminal Court had jurisdiction to try the appellant on that charge, but whether the facts alleged and proved against him amounted to a criminal offence under the English Act of Parliament.

This is a different question from that involved in the old cases about venue which have been relied on by each of the parties in this appeal. In the venue cases the facts alleged against the prisoner unquestionably amounted to a criminal offence in English

(1) 116 JP 216; [1952] 1 All ER 803.



law. The only question was whether under the technical rules of venue he was liable to be tried before a court whose jurors were drawn from one locality rather than another. The historical origin of these rules dated back to the embryonic stage of development of English trial by jury. Jurors originally combined the functions of 'know-ers' of facts as well as 'tri-ers' of facts and the prisoner was entitled to have his guilt determined by jurors drawn from an area where the inhabitants would be most likely to know the facts alleged to constitute the crime with which he was charged. The rules of venue continued to be applied long after the jury had assumed its modern function of deciding facts on evidence adduced before it. The question involved in the old venue cases was one of jurisdiction, and, although the reported cases are not decisive as to this, it may well be that under the former doctrine of venue before it was changed by statute in 1827 the jurisdiction to try a prisoner for a particular crime was exclusive to a court whose jurors were from the particular geographical area in which events constitutive of the crime were alleged to have occurred. But these cases dealing with competing local jurisdictions of courts in England and Wales are of marginal relevance to the disposition of the instant appeal.

The fact that the appellant was arrested in Greater London and committed for trial at the Central Criminal Court unquestionably gave to that court jurisdiction to determine whether or not he was guilty of the offence for which he was indicted. That offence was the statutory offence of 'blackmail' as defined in s 21 of the Theft Act 1968. The Act creates a new code of offences of obtaining or handling property or causing loss dishonestly or by other improper means. It supersedes the previous penal enactments in this field of law, and by s 32 (1) (a), abolishes any previously existing offences at common law falling within that field of crime. These are offences of which the victims are generally private individuals. The only question for your Lordships' House is what did Parliament mean when it enacted in 1968 that:

'A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces?'

The words are quite general. On a literal construction they are satisfied wherever the unwarranted demand is made. No mere application of rules of syntax or semantics can cut them down to 'if . . . he makes any unwarranted demand with menaces in England or Wales'. If the meaning of the subsection is to be qualified by implying some geographical limitation as to the place where the unwarranted demand is made, the limitation is not to be derived as a matter of linguistics from the actual words used but from broader considerations of the purpose of the code in which those words appear.

The Theft Act 1968 is a code of criminal law; and criminal law is about the right of the State to punish persons for their conduct, generally where that conduct is undertaken with a wicked intent or without justificatory excuse. A code of criminal law defines offences, ie, the kinds of conduct which render the person guilty of it liable to punishment. Conduct which constitutes a crime consists of a person's doing, or, less frequently, omitting to do, physical acts; and the definition of the crime always contains a description of physical acts or omissions, though it may, and in English law generally does, also require that the physical acts or omissions which constitute the described conduct should be done with a particular intent either expressly stated in the definition or to be implied from the mere fact that Parliament has made the described conduct punishable (cf *Sweet v Parsley* (1)). Your Lordships are not, however, concerned with the mental element in the definition of a crime in the instant appeal. But the definition may in addition provide that the described



conduct only becomes the defined crime if it is followed by particular consequences occurring after the completion of the physical acts done by the accused which constitute the described conduct. The consequences may be independent of any act of volition by the victim of the accused's conduct, as in the case of murder by shooting; or they may be dependent on an act of volition by the victim, as in the case of obtaining money by false pretences. But in either case the consequences may take effect on the victim in a different place from that where the physical acts of the accused were done.

Where the definition of the crime incorporates a requirement of consequences subsequent to the completion of the physical acts by the accused, Professor Gordon in his book on the Criminal Law of Scotland classifies the resultant crime as a 'result-crime' as distinct from a 'conduct-crime', but this nomenclature, though convenient in drawing attention to the distinction, tends to blur the fact that the conduct of the accused is as essential an ingredient of a 'result-crime' as it is of a 'conduct-crime'.

In his article in the *Law Quarterly Review* (vol 81, p 518) on 'Venue and the Ambit of Criminal Law', which was referred to by the Court of Appeal, Professor Glanville Williams used the contrasting phrases 'initiatory' to describe that element or ingredient of a crime which consists of the physical acts of the accused, and 'terminatory' to describe its subsequent consequences. He argues the case in favour of what he calls the 'initiatory theory of jurisdiction', ie, that the accused can be tried for the crime only by the courts of the State in which the accused did the physical acts, but concludes that the English courts have adopted the 'terminatory theory of jurisdiction', ie, that the accused can be tried for the crime only by the courts of the State in which the consequences of the accused's physical acts took effect. The Court of Appeal, in the instant appeal, was willing to assume that this was so.

The assumptions which underlie the proposition that English criminal law calls for a choice to be made between these rival theories of jurisdiction are, first, that the definition of the crime under consideration includes a requirement that the physical acts of the accused should be followed by specified consequences; otherwise, the initiatory and terminatory characteristics of the crime coincide. The second assumption is that the existence of jurisdiction in the courts of one State to try the accused for a particular crime, however the crime may be defined, necessarily excludes the jurisdiction of the courts of any other State to try the accused for his physical acts which either alone or in conjunction with their consequences constitute the crime defined. My Lords, whether or not the definition of the crime of blackmail in s 21 of the Theft Act 1968 is one which includes a requirement that the physical acts of the accused himself should be followed by any consequences is a problem of linguistics. The opinions held by your Lordships on it are divided and in due course I shall express my own opinion on this aspect of the instant appeal. But it does not matter which view is correct unless the second underlying assumption of Professor Glanville Williams's article is justified. This raises a more basic question in our criminal law than a mere problem of linguistics. This I will now proceed to examine.

The Parliament of the United Kingdom has plenary power, if it chooses to exercise it, to empower any court in the United Kingdom to punish persons present in its territories for having done physical acts wherever the acts were done and wherever their consequences took effect. When Parliament, as in the Theft Act 1968, defines new crimes in words which as a matter of language do not contain any geographical limitation either as to where a person's punishable conduct took place, or, when the definition requires that the conduct shall be followed by specified consequences, as to where those consequences took effect, what reason have we to suppose that Parliament intended any geographical limitation to be understood?

The only relevant reason, now that the technicalities of venue have long since been abolished, is to be found in the international rules of comity which, in the absence

of express provision to the contrary, it is presumed that Parliament did not intend to break. It would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territories if we were to punish persons for conduct which did not take place in the United Kingdom and had no harmful consequences there. But I see no reason in comity for requiring any wider limitation than that on the exercise by Parliament of its legislative power in the field of criminal law. There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other State. Nor, as the converse of this, can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the United Kingdom physical acts which have had harmful consequences on victims in England. The State is under a correlative duty to those who owe obedience to its laws to protect their interests and one of the purposes of criminal law is to afford such protection by deterring, by threat of punishment, conduct by other persons which is calculated to harm those interests. Comity gives no right to a State to insist that any person may with impunity do physical acts in its own territory which have harmful consequences to persons within the territory of another State. It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the State in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts.

The consequences of recognising the jurisdiction of an English court to try persons who do physical acts in England which have harmful consequences abroad as well as persons who do physical acts abroad which have harmful consequences in England is not to expose the accused to double jeopardy. This is avoided by the common law doctrine of *autrefois convict* and *autrefois acquit*, a doctrine which has always applied whether the previous conviction or acquittal based on the same facts was by an English court or by a foreign court: see *R v Roche* (1) and for a modern instance *R v Aughet* (2).

Turning from principle to the authorities, little assistance is, in my view, to be gained from the earlier cases. For reasons already stated those on internal venue in England are not in point. In those in which there was a foreign or Scottish element, generally cases of obtaining property or money by false pretences, the courts appear to have treated the problem as one of determining where the crime was 'committed', without drawing any distinction between the physical acts of the accused and the subsequent consequences of his acts, and to have treated the jurisdiction of an English court to try it as dependent on that. In *R v Holmes* (3) it was held on the facts that both the physical acts of the accused (the false pretences) and their consequences (the obtaining) took place in England and it was expressly left open whether the court would have had jurisdiction to try the accused if only one of these ingredients of the offence had taken place in this country. In *R v Ellis* (4) it was held as a matter of decision that the English court had jurisdiction to try the offence if the obtaining took place in England although the false pretences were made only in Scotland. This is not inconsistent with the view that an English court would likewise have jurisdiction in the converse case where the false pretences were made in England and the obtaining

(1) (1775), 1 Leach 134.

(2) (1918), 82 JP 174.

(3) (1883), 47 JP Jo 756; 12 QBD 23.

(4) 62 JP 838; [1899] 4 QB 230.

took place only in Scotland, and I do not find the dicta in the several judgments to be sufficiently clear or consistent to be persuasive to the contrary.

The question whether the jurisdiction to try offences of obtaining property or money by false pretences is treated in English law as exclusive to the court of the country in which the property or money was obtained did not fall for decision until comparatively modern times in *R v Harden* (1). The only matter discussed in the judgment was as to where the accused obtained cheques which were posted in Jersey addressed to the accused in England as a consequence of his false pretences made previously in England. The Court of Criminal Appeal applied the legal fiction as to the post office being the agent of the offeror, which forms part of the English civil law of contract, and held that the cheques were 'obtained' by the accused in Jersey. They assumed, but without giving any reasons, that this finding deprived an English court of jurisdiction to try the accused of the offence charged. My Lords, this assumption was really one as to the intention of Parliament when it passed the Larceny Act 1916. As I have already indicated, I see no justification for it. *R v Harden* (1) will, in my view, call for re-examination if a similar question should arise in connection with the new offence of obtaining property by deception under s 15 of the Theft Act 1968.

The only decision of this House itself which is even peripherally relevant to the issue in the instant appeal is *Board of Trade v Owen* (2). The question there was whether a conspiracy entered into in England to commit acts in Germany which were unlawful under German law to achieve an object which was unlawful there, constituted a conspiracy at common law which was indictable in England. The unanimous opinion of this House was given in the speech of LORD TUCKER. He treated the question correctly, not as one of jurisdiction, but as to what were the characteristics of the crime of conspiracy at common law. The conclusion reached on examination of the authorities was that the common law crime of conspiracy did not extend to an agreement to achieve an object which was unlawful in a foreign country or to use means to achieve it which were unlawful in a foreign country. This case has since been followed by the Court of Appeal in *R v Brixton Prison Governor, ex parte Rush* (3).

Conspiracy is a crime at common law. Its characteristics are to be ascertained by an analysis of the decided cases. Blackmail is a statutory offence. Its characteristics are to be ascertained by determining what Parliament meant by the definition of 'blackmail' in s 21 (1) of the Theft Act 1968. I have already pointed out that the actual words of the definition are quite general so far as concerns the place where the unwarranted demand is made. The absence of any geographical limitation on where the described conduct of the offender takes place or where its consequences take effect is common to all the other definitions of offences contained in the Act. If any such limitation does exist its source is to be discovered and its extent determined by applying some presumption as to Parliament's intention extraneous to the words in which the definitions of offences are couched.

Recognition that there is some limitation which 'goes without saying' is to be found in s 24 of the Act. This section, by sub-ss (1) and (4), extends the scope of the new offence of handling stolen goods created by s 22 to goods which have been stolen or obtained by blackmail or by deception elsewhere than in England and Wales. In doing so it treats the descriptions of conduct (including, where appropriate, its consequences) which appear in the statutory definitions of 'steal' in s 1, of 'blackmail' in s 21, and of obtaining property by deception in s 15, as wide enough to include that conduct even though it takes place outside England and Wales. But it also recognises that there may be circumstances in which that conduct is not an offence under the Act.

(1) 126 JP 130; [1962] 1 All ER 286, [1963] 1 QB 8.

(2) 121 JP 177; [1957] 1 All ER 411; [1957] AC 602.

(3) 133 JP 153; [1969] 1 All ER 316.

Where those circumstances exist the goods obtained as a result of the conduct are not to be treated as 'stolen' goods unless the conduct by which they were obtained amounted to a criminal offence under the law of the place where it occurred. It is thus evident that the circumstances which it is assumed may prevent conduct (including, where appropriate, its consequences) from being an offence under the Act, notwithstanding that it falls within the description of the offence, relate to the place where the conduct (and/or its consequences where these form part of the definition of the offence) occurred. The limitation acknowledged by these sub-sections is thus territorial in character. But neither they nor any other provisions of the Act throw further light on its extent.

The source of any presumption that Parliament intended that the right created by the Act to punish conduct should be subject to some territorial limitation on where the conduct takes place or its consequences take effect, can, in my view, only be the rules of international comity. And the extent of the limitation, where none has been expressed in words, can only be determined by considering what compliance with those rules requires. I can leave aside the question of territorial limitation as between the different jurisdictions (England and Wales, Scotland and Northern Ireland etc) within the United Kingdom, for this depends on constitutional practice, not on international comity. For reasons I have stated earlier, the rules of international comity, in my view, do not call for more than that each sovereign State should refrain from punishing persons for their conduct within the territory of another sovereign State, where that conduct has had no harmful consequences within the territory of the State which imposes the punishment. I see no reason for presuming that Parliament, in enacting the Theft Act 1968, intended to make the offences which it thereby created subject to any wider exclusion than this. In my view, where the definition of any such offence contains a requirement that the described conduct of the accused should be followed by described consequences the implied exclusion is limited to cases where *neither* the conduct *nor* its harmful consequences took place in England or Wales. It follows that, even if the definition of 'blackmail' in s 21 of the Act falls into the category of offences in which the physical acts of the accused must be followed by consequences occurring after completion of those acts, it is sufficient to constitute the offence of blackmail if *either* the physical acts are done *or* their consequences take effect in England or Wales.

The physical acts of the appellant in the instant case were that he wrote and posted to an addressee in Germany a letter which contained an unwarranted demand with menaces. Those acts took place in England. The consequences of those acts were that the letter was received and read by the addressee. Those consequences took place in Western Germany. It follows from what I have already said that, in my opinion, this latter fact would not bring the case within the implied exception. The appellant was guilty of the offence of blackmail whether or not the words 'makes an unwarranted demand' in s 21 of the Theft Act 1968, as a matter of linguistics, connote a requirement that the demand should be communicated to the person of whom it is made. The Court of Appeal held that those words did not connote any such requirement. That was sufficient to enable them to dispose of the instant appeal and that is the ground on which counsel for the prosecution has chiefly relied in your Lordships' House.

My Lords, I too think that the Court of Appeal were right as to the construction of the section and that the appeal could be dismissed on this alternative ground. Arguments as to the meaning of ordinary everyday phrases are not susceptible of much elaboration. The Theft Act 1968 makes a welcome departure from the former style of drafting in criminal statutes. It is expressed in simple language as used and understood by ordinary literate men and women. It avoids so far as possible those terms of art which have acquired a special meaning understood only by lawyers in which

many of the penal enactments which it supersedes were couched. So the question which has to be answered is: Would a man say in ordinary conversation: 'I have made a demand' when he had written a letter containing a demand and posted it to the person to whom the demand was addressed? Or would he not use those words until the letter had been received and read by the addressee? My answer to that question is that it would be natural for him to say: 'I've made a demand' as soon as he had posted the letter, for he would have done all that was in his power to make the demand. He might add, if it were the fact, 'but it has not reached X yet' or 'I made a demand but it got lost in the post'. What at any rate he would not say is: 'I shall make a demand when X receives my letter', unless he contemplated making some further demand after the letter had been received.

I see nothing in the context or in the purpose of the section to indicate that the words bear any other meaning than that which I have suggested they would bear in ordinary conversation. I do not attach overmuch importance to the omission of the words 'of any person' which were present in the corresponding ss 29 and 30 of the Larceny Act 1916 which were superseded by s 21 of the Theft Act 1968. Their presence might have strengthened the argument for the contrary view, but their absence may be accounted for by a desire for brevity and simplicity. I should, however, give considerable weight to the fact that s 29 of the Larceny Act 1916, which dealt separately with 'uttering' letters containing a demand, in my view unquestionably made it an offence to post such a letter in England to an addressee abroad; and I should hesitate to attribute to Parliament in 1968 the more chauvinistic attitude of tolerating such conduct within the territory subject to its legislative powers.

As respects the purpose of the section, I see no reason for supposing that Parliament did not intend to punish conduct which is anti-social or wicked, if that word is still in current use, unless the person guilty of the conduct achieves his intended object of gain to himself or loss caused to another. The fact that what a reasonable man would regard as an unwarranted demand with menaces after being posted by its author goes astray and never reaches the addressee, or reaches him but is not understood by him, or because of his unusual fortitude fails to disturb his equanimity, as was the case in *R v Clear* (1), may be a relevant factor in considering what punishment is appropriate but does not make the conduct of the author himself any less wicked or anti-social or less meet to be deterred.

My Lords, all that has to be decided on this aspect of the instant appeal is whether the appellant 'made a demand' when he posted his letter to the addressee. In the course of the argument many other and ingenious ways in which a blackmailer might choose to send his demand to his victim have been canvassed, and many possible, even though unlikely, events which might intervene between the sending of the demand by the blackmailer and its receipt and comprehension by the victim, have been discussed. These cases, which so far are only imaginary, may fall to be decided if they ever should occur in real life. But unless the purpose of the new style of drafting used in the Theft Act 1968 is to be defeated they, too, should be decided by answering the question: Are the circumstances of this case such as would prompt a man in ordinary conversation to say: 'I have made a demand'? For both the reasons I have given I would dismiss this appeal.

*Appeal dismissed.*

Solicitors: *Quirke & Co; Director of Public Prosecutions.*

G.F.L.B.

(1) 132 JP 103; [1968] 1 All ER 74; [1968] 1 QB 670.



**COURT OF APPEAL (CIVIL DIVISION)**

(LORD DENNING, MR, PHILLIMORE AND CAIRNS, LJJ)

21st, 22nd October 1970

RUGBY JOINT WATER BOARD v SHAW-FOX AND OTHERS (TRUSTEES OF THE WILL OF J T SHAW)

RUGBY JOINT WATER BOARD v FOOTTIT AND ANOTHER  
FOOTTIT AND ANOTHER v RUGBY JOINT WATER BOARD

*Agriculture—Compulsory purchase of holding—Compensation for landlord—Assessment on basis of length of notice to tenant—Agricultural Holdings Act, 1948, s 24 (2) (b).*

By s 23 (1) of the Agricultural Holdings Act, 1948, twelve months' notice must be given to quit an agricultural holding. By s 24 (2) (b) of the Act no statutory consent to a notice to quit (as required by s 24 (1)) is necessary where 'the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning'.

A water board obtained planning permission to construct a reservoir on two farms, both of which were let to tenants. In relation to the first farm s 23 (1) of the Act of 1948 applied; the lease of the second farm contained a clause giving the landlords power to resume possession on six weeks' notice.

HELD: (i) the application of s 24 (2) (b) was not limited to a case where the land was required for use by the landlord, but extended to where it was required for use by some person other than the landlord; (ii) in the present case the landlords were entitled to compensation for the compulsory acquisition of the land on the basis, as to the first farm, that the tenant could be turned out on twelve months' notice, and, as to the second farm, that he could be turned out on six months' notice.

CASE STATED by Lands Tribunal.

*George Newsom QC and Guy Seward for the water board.*

*W J Glover QC and J A R Grove for the claimants.*

**LORD DENNING MR:** This case arises out of a proposal to construct a reservoir in Warwickshire. The Rugby Joint Water Board obtained compulsory powers to take some farm land. The question is the proper measure of compensation. One farm was owned by the second claimants, Mr and Mrs Foottit. The water board took 129 acres out of the 132 acres of their farm. The other farm was owned by the first claimants, J H Shaw-Fox, P H V Twist, and H A Sibley. The water board took 120 acres out of the 216 acres of their farm. Both farms were let to agricultural tenants. In each lease there was a power for the owner to determine the tenancy on 12 months' notice expiring on Lady Day of any year. In addition, in the second claimants' case, there was a clause giving the landlords power to resume possession when it was required for special purposes.

On 6th April 1966, the Minister gave the water board planning permission to enable the water board to construct a reservoir on the land. On 17th March 1967, the water board, in pursuance of its compulsory powers, served notices to treat on the first and second claimants. The question is: What compensation is payable to the first and second claimants, as distinct from the tenants? The first and second claimants say that compensation should be assessed on the basis that each of them could turn out his tenant on a year's notice, i.e., by a notice given on 25th March 1967 to expire on 25th March 1968, so that the first and second claimants would get vacant possession in a year's time, whereas the water board says that the compensation should be assessed on the basis that the tenant had virtually a right to be there for life under the Agricultural Holdings Acts, so that the first and second claimants would not get possession until the tenant died, which might not be for many years.



This point would seem to be covered by the decision in *Minister of Transport v Pettit* (1). In that case we considered the compensation payable to the tenant of a farm on its compulsory acquisition. The majority of this court held that the tenant would get only small compensation because his compensation would have to be assessed on the basis that he could be turned out on 12 months' notice. That decision is in full accord with the Agriculture (Miscellaneous Provisions) Act 1968. Section 42 of that Act provides, in effect, that the tenant's compensation shall be assessed on the basis that he has to go on the expiry of 12 months' notice to quit. But it is to be noticed that he gets compensation for disturbance under s 9 of that Act, which would be a sum equal to four years' rent. If *Pettit's* case was rightly decided and the tenant only gets small compensation on the basis that he has only 12 months to go, it seems to follow that the owner of the farm should get large compensation on the basis that at the end of 12 months he would get vacant possession.

Counsel for the water board recognises that *Pettit's* case is binding on this court, but he seeks to distinguish it by taking a point which was not taken there. He goes back to s 23 (1) and s 24 (2) (b) of the Agricultural Holdings Act, 1948, which provide that the landlord of an agricultural holding can get the tenant out on 12 months' notice if

'the land is required for use, other than agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning.'

Counsel says that that subsection only applies when the land is required by the landlord and not when it is required by anyone else, such as the water board here. I cannot agree with this submission. The section does not say: 'is required by the landlord for use by him'. It simply says: 'is required for use, other than for agriculture', which means, I think, a use by anyone so long as the person is sufficiently definite, and the requirement sufficiently certain. That is borne out by what SIR RAYMOND EVERSHED MR said in *Jones v Gates* (2). It is to be noticed also that planning permission can be given to third persons other than landlord and tenant who have not yet acquired the land but only intend to acquire it.

I am of opinion, therefore, that s 24 (2) (b) applies in this case to this effect. Once planning permission was given to the water board to construct a reservoir and the land was required by it for the purpose, the first and second claimants were entitled to turn out the tenants on 12 months' notice. The compensation should, therefore, be assessed on that basis.

I turn to the cross-appeal. It only applies in the case of the second claimants. The lease gave the second claimants in certain circumstances power to resume possession on six weeks' notice. The second claimants say that the compensation should be assessed on that basis, and not on the basis that they had to give 12 months' notice. The particular clause in the lease was a reservation reserving to the second claimants:

'The right pursuant to s 23 (1) (b) of the Agricultural Holdings Act 1948 from time to time to resume possession of any part of the said lands and buildings which the landlords may from time to time require for building mining road-making or any purpose connected therewith or for any other purpose (not being the use of the land for agriculture) upon giving to the tenant not less than forty-two days previous notice in writing of such requirement and allowing to the tenant fair and reasonable compensation...'

(1) (1969), 67 LGR 449.

(2) [1954] 1 All ER 158.

Turning now to s 23 (1) (b) of the Act of 1948, it provides in effect that an agricultural holding can be determined by less than 12 months' notice if it is

'a notice given in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the holding or some part thereof for some specified purpose other than the use of the land for agriculture.'

The Lands Tribunal rejected the claimants' contention. The tribunal simply said: 'I do not think that either claimant can rely on the terms of his re-entry clause'. Counsel for the second claimants says that they can. He says that the reservation clause brings into operation s 23 (1) (b) of the Act, whereas counsel for the water board emphasises the words in the reservation clause: 'which the landlords may from time to time require'. He says that the second claimants have not required this at all and that it is only the water board who require it. This is a nice point of construction. On the whole, I think that the second claimants are right. I cannot think that, in order to operate the clause, it was necessary for the second claimants themselves to have to do the building, mining or road making. It was intended that the clause should operate to the full extent of s 23 (1) (b). It applies if the land is being resumed for a purpose other than agriculture, e.g. for a reservoir. The compensation is to be assessed on the basis that the landlord could resume possession on the six weeks' notice.

So, in the case of the first claimants compensation is to be awarded on the footing that the tenant can be got out on 12 months' notice, and in the case of the second claimants on the footing that the tenant can be got out on six weeks' notice. I would therefore dismiss the appeal, but allow the cross-appeal.

**PHILLIMORE LJ:** I agree. The court has to decide the basis on which the interest of the claimants in each of these two cases is to be assessed. As I understand it, the interest crystallises as at the date of service of the notice to treat, which was on or about 11th March 1967. So far as the appeal is concerned, as LORD DENNING MR has said, the matter is really covered, with one exception, by the decision of this court in *Minister of Transport v Pettit* (1). Indeed, counsel for the water board very fairly conceded that it was not open to him in this court to argue that that decision was wrong. He has, however, taken a point which was not dealt with in that case, namely, that the provisions of s 24 (2) (b) of the Agricultural Holdings Act 1948, which deal with the operation of notices to quit, refer only to an occasion where the land is required by the landlord for a use other than agriculture. As LORD DENNING MR has pointed out, that does involve reading into the section words which are not there, because the wording as it stands is if 'the notice to quit is given on the ground that the land is required for a use', not 'is required by the landlord for a use...'. For myself, dealing with this particular case, while I agree with the view of LORD DENNING MR that as a matter of construction the words must be given their ordinary broad sense and that there is no justification for introducing these limitations proposed by counsel for the water board I also would rely on the argument of counsel for the claimants on the whole scheme of the Act dealing with notices to quit. He pointed out that on no less than five occasions, of which this is one, where reference is made to certain notices to quit as being exceptions from the ordinary rule, when their effect is fettered by the Act, the language is entirely broad and in no case involves the proposed user of the land for which notice to quit is given being a user of the landlord himself. He referred us to s 23 (1) (b), s 31 (1), and s 24 (2) (b), that being the one particularly in point, and, in addition, s 25 (1) (a) and s 23 (1) (d). In each case he said that the distinction to be drawn is that the land is required for use for a non-agricultural

(1) (1969), 67 LGR 449.

purpose and not in any instance that it is required for such purpose by the landlord who gives the notice to quit. That seems to me to be amply justified by the wording of each of those provisions to which I have referred. Accordingly, I think that the argument of counsel for the water board on the appeal must fail.

On the cross-appeal I have come to the same conclusion as LORD DENNING MR. I cannot think that the intention in the clause which we have to construe was really to do more than to import the provisions of s 23 (1) (b) which refer to a notice given in pursuance of a provision in the contract authorising the resumption of possession of the holding or some part thereof for some specified purpose other than use of the land for agriculture. Here again, as was pointed out by counsel for the claimants, there is no suggestion that that is a purpose which is to be carried out by the second claimants, and, indeed, to put on the clause the construction for which counsel for the water board contends, and which the tribunal appears to have accepted, involves the interposition of words limiting the giving of the notice to a case where the landlord requires the land for his own use for one of the specified purposes. I can see no justification for importing those words, and I would agree with LORD DENNING MR that the cross-appeal should accordingly succeed. I agree, therefore, that the appeal fails and the cross-appeal succeeds.

**CAIRNS LJ:** I agree that the water board's appeals should be dismissed for the reasons given by LORD DENNING MR and PHILLMORE LJ, but as to the second claimants' cross-appeal I have had grave doubts. The reasoning which has led us to dismiss the water board's appeals depends, at least in part, on the fact that, under s 24 (2) (b) of the Agricultural Holdings Act 1948, the language used is simply 'the land is required'; and I agree that there is no justification for importing there the further words 'by the landlord'. But when one comes to the interpretation, not of s 23 (1) of the Act of 1948 but of cl 1 (3) of the second claimants' lease, one finds different language, i.e., 'which the landlord may . . . require'. Therefore, there is there no question of implying additional words. The question is whether the expression 'the landlord may . . . require' should be given so extended a meaning as counsel for the claimants contended for. I have considerable doubts whether it should be. Secondly, I do not feel at all certain that it can be said that on the facts it was shown that the second claimants required the land, whatever interpretation may be applied to the word 'require'. However, I appreciate the force of the considerations which have made LORD DENNING MR and PHILLMORE LJ take the view that the wider interpretation can be given to this clause in the lease, and in the end, I do not dissent from the conclusion to which they have come.

*Order accordingly.*

Solicitors: *Bretherton, Turpin & Pell, Rugby; Witham, Weld & Co, Liverpool.*

G.F.L.B.

QUEEN'S BENCH DIVISION

(SWANWICK, J)

12th, 13th, 14th, 23rd October 1970

LONDON BOROUGH OF EALING v RACE RELATIONS BOARD AND  
ANOTHER

*Race Relations—Housing—Council houses—Tenants restricted to British subjects—Validity—Action for declarations by local authority—Competency—Race Relations Act, 1968, s 2 (1), s 19 (10).*

A borough council adopted rules to regulate the selection of tenants of council houses. By r 3 (1): 'An applicant must be a British subject within the meaning of the British Nationality Act.'

By s 2 (1) of the Race Relations Act, 1968: 'It shall be unlawful for any person concerned with the provision to the public or a section of the public . . . of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them . . .' By s 1 'a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other . . . less favourably than he treats or would treat other persons'. By s 5 it is made unlawful 'for any person having power to dispose . . . of housing accommodation . . . to discriminate . . . against any person seeking to acquire any such accommodation'. By s 19 (1) civil proceedings may be brought by the Race Relations Board in specified circumstances in respect of any act alleged to be unlawful by virtue of any provision of Part 1 of the Act, which includes ss 1 and 2. By s 19 (10): 'Nothing in this Act shall affect the right to bring any proceedings in England and Wales, whether civil or criminal, which might have been brought if this Act had not been passed, but except as provided by subsection (1) above and this subsection no proceedings . . . shall lie against any person in respect of any act which is unlawful by virtue only of a provision of Part 1 of this Act'.

Held: despite the closing words of s 19 (10) an action by the borough council for declarations that r 3 (1) (supra) did not constitute any unlawful discrimination against the second defendant, a Polish national, on the ground of his national origins, and that the borough was entitled to refuse to place him on the housing waiting list on the ground that he was not a British subject, was competent; but the practical effect of r 3 (1) was to place, for the purposes of s 5 of the Act, in a less favourable position than almost all people of British or Commonwealth origin the vast majority of people of other national origins and was thus in effect and in all except an insignificant number of cases a discrimination on the ground of national origins although it was not expressed in those terms, and, therefore, the declarations sought by the borough council would not be granted.

ORIGINATING SUMMONS in an action by the London Borough of Ealing for declarations against the first defendant, the Race Relations Board, and the second defendant, Stanislaw Zesko.

J P Comyn QC and K C L Smithies for the borough.

R A MacCrindle QC and Anthony Lester for the board.

The second defendant did not appear.

*Cur adv vult*

23rd October. SWANWICK J read the following judgment: This is an originating summons by the London Borough of Ealing ('the borough') as plaintiff against the first defendant, the Race Relations Board ('the board'), and the second defendant, Mr Stanislaw Zesko, claiming a number of declarations. The second defendant did not appear at the hearing and, indeed, has not entered an appearance, but his interests and possible viewpoint have been adequately covered by counsel for the board. As well as the substantive point raised by the case, the question of the

jurisdiction of this court to hear and determine this matter is involved. Of course, the court cannot arrogate jurisdiction to itself, nor can jurisdiction be conferred on it by the agreement of the parties. The borough asked me to decide the substantive point and to grant relief if I decide in its favour.

Instructions of counsel for the board are equivocal. On the one hand the board would not be averse to a determination by this court of the substantive point in this particular case; on the other hand it does not wish my decision to create a precedent, binding or otherwise, and it would have liked me to state that it does not. Compliance with this request is clearly impossible, and I have said so. It would be derogatory of the status and powers of the High Court for it to attempt to set limits to the authority of its decisions generally or to their binding effect on an inferior court in a particular case, and would itself create a wholly bad precedent. I am, however, naturally anxious to save duplication of effort and legal costs, and I have, therefore, consented to listen to argument on both issues and to give my decision on both, whatever it may be, to the end that, if it should be determined by me or on appeal that this court has jurisdiction, my judgment on the substantive question should, if it stands, be binding on a county court. If, of course, it should be determined by my unchallenged decision or on appeal that this court has no jurisdiction, my decision on the substantive point will amount to no more than an observation of opinion. If I find that I have jurisdiction, there is also the question of how I should exercise my discretion to grant what is of course a discretionary remedy. Before I deal with any of these points, it would probably be convenient if I were to summarise the basic facts which are undisputed.

The second defendant was born and bred a Polish national, albeit born in exile in Eastern Siberia in 1913. In 1922, he returned to Poland and eventually joined the Polish Air Force. In November 1939, after the Nazi invasion of Poland, he escaped to France and thence came to the United Kingdom. He enlisted in the Royal Air Force and completed three operational tours in Bomber Command. Since December 1939 he has lived in the United Kingdom.

In December 1959 the second defendant married his wife, who was also Polish by birth and nationality. For several years they lived together in the borough of Ealing, up to February 1970, in conditions of great hardship. They have one child, born in 1960. The second defendant is a glass toughener, a man of perfect character and integrity, and obviously a wholly admirable person.

Following the establishment of the Greater London Council, the council of the present London Borough of Ealing, that is to say the plaintiffs, became operative on 1st April 1965 under the London Government Act 1963, and is the local housing authority. As such it has always maintained two lists, first, a register of all applications for housing accommodation under s 22 (3) of the 1963 Act, and, secondly, a list of persons transferred from this register to the housing waiting list. Rules for transfer from the register to the list were adopted by the borough on 15th June 1965. Under these rules, once on the list, the allocation of houses to the persons listed is in accordance with a points scheme which includes points awarded on the basis of waiting time. Rule 3 (1) stipulates: 'An applicant must be a British subject within the meaning of the British Nationality Act 1948'. Rule 3 (2) imposes a further condition as to length of residence in the borough in order to qualify. Rule 6 gives the borough a discretionary power to vary the rules in any specific case.

In July 1966, the second defendant submitted to the borough a housing application form, of course describing himself and his wife as Polish nationals born in Poland. Nothing came of this application. Examination of it shows that it was marked 'Not British subjects' and 'transfer to W/L [meaning waiting list] when British nat. [meaning naturalisation] papers seen'. Through the auspices of the Polish Air Force Association in Great Britain, a further approach was made to the borough

in October 1968, and the second defendant submitted, in November 1968, a further housing application form, again correctly describing himself and his wife in the same terms as before. On 4th February 1969, the borough notified the association of its policy not to consider any applicant unless he was a British subject, and it maintained its decision despite protests. The association complained to the board that the borough's action constituted unlawful discrimination against the second defendant, in breach of the Race Relations Act 1968. The board, in accordance with s 15 of that Act, notified the borough of the complaint and proceeded to investigate it. On 10th April 1969, it formed the opinion that the borough had unlawfully discriminated against the second defendant on the ground of his 'national origins', within the meaning of s 1 (1) of the Act. On 2nd June it so notified the borough. Thereafter it endeavoured, in accordance with its obligation under s 15 (3) (b), to secure a settlement between the parties and to seek an assurance against repetition of similar action. Its request to this effect was contained in a letter of 2nd June 1969. Following further negotiations, the board's adherence to its opinion and repetition of its request was conveyed to the borough by a letter of 14th November 1969. On 18th November, the borough finally rejected this request and on 21st November it issued the present summons, the board having already said that it would suspend, until after these proceedings, its decision whether or not to take civil proceedings against the borough under s 19 of the Act in the county court.

It transpires that since the inception of these proceedings the second defendant has reluctantly decided to abandon his Polish nationality and, on 31st July 1969, he applied for naturalisation as a British subject. With his record, it is not surprising that his application has been successful. He is now in fact a British subject by naturalisation, and in accordance with his application, which was never withdrawn, he has been placed on the housing waiting list. Since these proceedings were started he has also rehoused himself. The question therefore arises whether, quite apart from the issue of jurisdiction, the substantive question and the relief sought have become so academic that the court should refuse to consider them. However, I am told that the second defendant's present house is scheduled for demolition and that he desires to remain on the housing waiting list. On that list he must suffer some loss of points for waiting time if his inclusion should date, as it now does, only from the date of his naturalisation.

So far as the borough is concerned, its position vis-à-vis the board has not altered in that the board's expression of opinion and request for assurance in the future still remain with the implied threat of possible proceedings under the Act in the event of the borough's refusal. Counsel for the board does not contend that if this court had jurisdiction to make any of the declarations claimed when this action started it has become academic since, nor does he wish to rely on the subsequent events that I have mentioned. On the whole, therefore, I do not consider that, if this court had jurisdiction to grant, and would in its discretion have granted, the relief claimed when the action was started, these later events should necessarily alter my decision, although I should bear them in mind in deciding on the exercise of my discretion.

By its originating summons, the borough claims, against both the board and the second defendant, five declarations. The first four of these expressly refer to the Race Relations Act 1968, and by them the court is asked in effect to declare that the borough's rule 3 (1), which I have read, does not in law constitute an unlawful discrimination against the second defendant on the ground of his national origins within the meaning of s 1 (1) of the Act. The fifth declaration does not in terms refer to the Act but claims that the borough was entitled to refuse to place the second defendant on the housing waiting list on the ground that he was not a British subject, but was of foreign or alien nationality.



I will deal first with the question of jurisdiction. This depends primarily on the construction of s 19 of the Race Relations Act 1968. But to follow the arguments, I must briefly review the scheme of the Act. Part I, which consists of ss 1-13, defines what shall be unlawful discrimination under the Act. This comprises treating any person less favourably than another person 'on the ground of colour, race or ethnic or national origins', in certain defined situations. The relevant situation for the purpose of this action is dealt with by s 5 which makes it unlawful for any person having power to dispose of, or being concerned with the disposal of, housing accommodation to discriminate as above defined

'(a) against any person seeking to acquire any such accommodation, premises or other land by refusing or deliberately omitting to dispose of it to him, or to dispose of it to him on the like terms and in the like circumstances as in the case of other persons; . . . or (c) against any person in need of any such accommodation, premises or other land by deliberately treating that other person differently from others in respect of any list of persons in need of it.'

Part II of the Act, consisting of ss 14-24, substitutes for the Race Relations Board set up by the Race Relations Act 1965, a board by the same name but differently constituted in accordance with sched. 1 to the 1968 Act—differently constituted in that it has more personnel and for the first time has the status of a body corporate with perpetual succession and a common seal. This board and its area conciliation committees are charged by the Act with the duty of investigating complaints of unlawful discrimination as defined by the Act and seeking a settlement and, in their discretion, a written assurance against repetition or further similar acts, in default of which the board is required, by s 15 (4), to determine whether to bring proceedings under s 19 of the Act. It must notify the parties of the opinion, if any, that it has formed, of whether or not it has obtained a settlement and assurance, and of what action, if any, it proposes to take.

I turn now to s 19 (1), which provides:

'Civil proceedings may be brought in England and Wales by the Race Relations Board, in pursuance of a determination of theirs under s 15 of, or schedule 2 or 3 to, this Act and not otherwise in respect of any act alleged to be unlawful by virtue of any provision of Part I of this Act, and in those proceedings a claim—

'(a) may be made for such an injunction as is mentioned in s 21 below;

'(b) may be made, on behalf of a person alleged to have suffered loss as a result of that act, for such damages as are mentioned in s 22 below;

'(c) may be made for such an injunction and such damages; or

'(d) may be made for a declaration that that act is unlawful by virtue of that provision or any other provision of the said Part I;

and in those proceedings, whether or not such a claim is made, an application may be made in accordance with s 23 below for revision of any contract or term in a contract alleged to contravene any such provision.'

Subsections (2)-(9) confine such proceedings to any of the particular county courts nominated by the Lord Chancellor and make various procedural provisions, including a requirement that the judge shall be assisted by two assessors with special experience to assist. There is a right of appeal to the Court of Appeal on questions of fact as well as of law. Section 19 (10) provides:

'Nothing in this Act shall affect the right to bring any proceedings in England and Wales, whether civil or criminal, which might have been brought if this Act had not been passed, but except as provided by subsection (1) above and this

subsection no proceedings, whether civil or criminal, shall lie against any person in respect of any act which is unlawful by virtue only of a provision of Part I of this Act.'

This being the scheme of the Act and its relevant provisions, counsel for the board submits that this court has no jurisdiction to grant the relief claimed. His contentions are, first, that s 19 (10) expressly forbids the borough to bring these proceedings because, he says, they are brought against persons, namely, the board and the second defendant, in respect of an act which is unlawful by virtue only of a provision of Part I of the Act, and that this subsection provides that no such proceedings shall lie except as provided by s 19 (1) or (10) itself. He goes on to argue that the borough cannot claim that s 19 (1) gives it the right to bring these proceedings, with which counsel for the borough agrees, and that the first part of s 19 (10) does not relieve against this prohibition because these proceedings could not have been brought if this Act had not been passed. On this latter point, counsel for the borough submitted, as somewhat of an afterthought, that, if this Act had not been passed, these proceedings could have been brought either under s 5 of the Race Relations Act 1965, which forbids discrimination as defined above in the disposal of tenancies, or quite independently of any Race Relations Act, but in my judgment these submissions were ill-founded. Section 5 of the 1965 Act clearly relates only to the disposal of existing tenancies and the Race Relations Board as constituted by that Act was a different body from the present board and had no legal personality.

Apart from the Race Relations Act, no one could, in my judgment, possibly have suggested that there was anything wrong with the borough's rules, as indeed counsel for the borough was at pains to point out, submitting a list of restrictions of aliens and citing authorities, of which the most striking was *Re Lysaght, Hill v Royal College of Surgeons of England* (1), to show that far wider discriminations were permissible at common law, as I entirely agree. This first contention of counsel for the board, therefore, depends wholly on whether the present proceedings are brought in respect of an act which is unlawful by virtue only of a provision of Part I of this Act, and thus forbidden by s 19 (10). I will deal with this when I come to the main argument of counsel for the borough on jurisdiction. I should add that counsel for the board contended, somewhat faintly, that the words 'and not otherwise' in s 19 (1) were themselves directed to prohibiting anyone other than the board from bringing civil proceedings in respect of an alleged act of discrimination, but I hold that these words merely debar the board from taking civil proceedings in respect of such an act elsewhere or otherwise than in accordance with the procedure laid down by s 19.

The second contention of counsel for the board on this issue is that the Act clearly implies an intention to exclude the jurisdiction of the High Court to consider its terms relating to discrimination. He suggests that ss 19-24, which are headed 'Legal Proceedings', form a complete and exclusive code. He points out what is clearly correct, as I have said, that s 19 (1) forbids the board to bring civil proceedings for alleged discrimination except in the rather special tribunal and by the procedure laid down by ss 19-24. Counsel suggests that it would be odd and unfair to the board, which is alone given express, although limited, rights to sue for such infringements, if an alleged discriminator could claim the right to sue for a declaration in a higher court. He contends that the person who alleges that he is discriminated against is also forbidden from taking any legal proceedings on his own behalf, and suggests that the same should apply to an alleged discriminator. He points out that the legislature has set up a specially constituted tribunal to deal with sensitive issues, and he makes one or two points, which I regard as of less importance and with which I will deal later in my judgment on this issue. Finally, counsel for the board submits

(1) [1965] 2 All ER 888; [1966] Ch 191.

that, even if there is jurisdiction in the High Court, it would not be appropriate for me to exercise my discretion to grant the relief prayed because the board has not gone beyond an expression of opinion and a request for an assurance; it may never proceed in the county court, and if it does, he says that the borough can then raise all the contentions which it is now seeking to raise here. Counsel contends that no live issue has been raised and quotes *Re Clay, Clay v Booth* (1), *Re Barnato, Joel v Sanges* (2) and *Punton v Ministry of Pensions and National Insurance* (No 2) (3). I will deal with those authorities later.

The contentions of counsel for the borough on this issue are, first, that clear words are needed to oust the jurisdiction of the High Court expressly, and I would add at least as clear words to oust it by implication. For authority for this proposition, if authority were needed, I was referred to the well-known words of VISCOUNT SIMONDS in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* (4):

'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNAIR, J., called it in *Francis v. Yiewsley & West Drayton U.D.C.* (5), a "fundamental rule" from which I would not for my part sanction any departure.'

Of course if, as in *Barracough v Brown* (6), to which I was also referred, a new right is given and a particular inferior court is nominated *uno flatu*, as LORD WATSON said, in which to obtain a remedy, that same remedy cannot be sought in the High Court, but where, as in the *Pyx Granite Co* case (4), a person seeks a declaration that the circumstances of this case do not come at all within the provisions of the new Act that threatens him, and in particular where he has no right of access of his own motion to the inferior court to establish his case, the principle of *Barracough's* case could not, in my judgment, possibly apply. Counsel for the borough submits that this is the present position of the borough and I consider that he is right.

The second contention of counsel for the borough is that all the Act by its terms prevents and forbids is, first, that anyone except the board should bring proceedings to prevent or claim damages for breaches of its provisions, that is to say, for acts rendered unlawful by it, and, secondly, that the board should bring any proceedings for this purpose except by the stipulated procedure and in the nominated court. The Act, he submits, does not forbid or prevent anyone from bringing proceedings either independently of the Act or in relation to it for any other purpose. Again, I consider that he is right.

In my judgment the words 'proceedings . . . in respect of any act alleged to be unlawful by virtue of the provisions of Part I of this Act' run through and govern ss 19-24, and in s 19 (10) they have become 'proceedings . . . against any person in respect of an act which is unlawful by virtue only of Part I . . .'. Counsel for the borough says, rightly, that the borough is not bringing any such proceedings; it is bringing proceedings to declare that an act of the borough is not unlawful but is lawful. Thus, as in *Barwick v South Eastern and Chatham Ry Cos* (7), the borough is not asking this court to usurp functions exclusively assigned to another tribunal. If its

(1) [1918-19] All ER Rep 94; [1919] 1 Ch 66.

(2) [1949] 1 All ER 515; [1949] Ch 258.

(3) [1963] 2 All ER 693; *on appeal* CA [1964] 1 All ER 448.

(4) 123 JP 429; [1959] 3 All ER 1; [1960] AC 260.

(5) [1957] 1 All ER 825; [1957] 2 QB 136; *aff'd* CA 122 JP 31; [1957] 3 All ER 529; [1958] 1 QB 478.

(6) 62 JP 275; [1895-99] All ER Rep 239; [1897] AC 615.

(7) 85 JP 65; [1921] 1 KB 187.

contention on the substantive question in this case is correct, it will follow that this court will in effect have exercised its jurisdiction to declare that the special tribunal has, in law, no jurisdiction in circumstances such as the present where there is no dispute of fact. If the borough's contention on the substantive question is wrong, these proceedings will fail and the board can decide, if it so wishes, to take proceedings in the nominated county court.

What then of the other objections of counsel for the board? He says, and in my judgment rightly, that, if I am correct, there is a lack of mutuality in that the borough can ask the High Court to declare that its actions are lawful, whereas the board is forbidden to do the converse directly and must seek any such declaration in the county court in the first instance. It is, however, to be observed that the board can initiate proceedings to determine the illegality which it alleges, and that if dissatisfied with the decision of the county court it can have recourse to the Court of Appeal. Thus its hardship is far less than that of the borough, who, if I am wrong, cannot go to any court at all unless the board chooses to take it.

There are obviously good reasons of policy why the person alleging discrimination against himself is debarred from himself bringing enforcement proceedings. His claim has to be pursued through the board and brought on his behalf by it if it thinks fit. It is said that if, as in the present case, he is made a defendant to High Court proceedings, he might be ordered to pay costs. If, however, he is wise, he will, like the second defendant, enter no appearance and leave his interests in the safe hands of the board. In any event, I am somewhat doubtful whether he is properly made a defendant to this action, since it could be argued with force that the issue raised is between the borough and the board which alone has formally expressed its opinion and requested the assurance. Furthermore, this problem, should it ever arise, could be adequately dealt with by the exercise of the court's discretion and the same would apply if, in High Court proceedings for a declaration, discovery were sought of documents for which special privilege is given in the county court by s 24—a somewhat unlikely event.

It remains for me to deal with the submissions of counsel for the board that there is not yet a live issue between the borough and the board sufficient to found my jurisdiction, or at least not one sufficient to warrant the exercise of my discretion. In making this submission counsel, as I have said, expressly and again I consider rightly abjured any intention to rely on the events subsequent to the issue of these proceedings, which I have mentioned. On this limb of the argument there were cited to me three cases. In *Re Clay* (1), an executor, who had been ordered to pay some costs, paid them but reserved any rights which he might have had under a deed to claim an indemnity against the beneficiaries. He did not, however, make any actual claim against them. They sought a declaration that they were not liable under the deed, but it was held that unless and until a claim was made there was no jurisdiction to make the declaration. Similarly, in *Re Barnato* (2), the trustees of a fund joined the Inland Revenue in an effort to get the court to decide whether, if they made an advance to a child and she died within five years, estate duty would be payable, and it was held that the court would not decide a hypothetical question about events which might never occur.

I would distinguish these two cases from the present situation. Of course, here the board has formed and communicated a formal opinion that the borough has been guilty of unlawful conduct and has sought an assurance against repetition. Moreover the borough is a public body which is, in my judgment, entitled in these circumstances to seek a ruling from this court as to the legality of its rule, provided of course that

(1) [1918-19] All ER Rep 94; [1919] 1 Ch 66.

(2) [1949] 1 All ER 515; [1949] Ch 258.

there is a defendant with sufficient interest in the matter. In the circumstances, I consider that these conditions are satisfied and that I have jurisdiction, and that this is a matter where I would exercise my discretion to grant relief by way of declaration, subject, of course, to my being satisfied that the borough is right in its contention on the substantive point of law.

The third case of counsel for the board, *Punton v Ministry of Pensions* (1), I regard as distinguishable on other grounds. In that case, the national insurance commissioner had held that the plaintiffs were disqualified for unemployment benefit for the period of a strike by other workers. They sought a declaration in the High Court that he was wrong in law. The judge held that he had no jurisdiction, and in any event refused the relief in the exercise of his discretion. The Court of Appeal upheld the judge, saying that there was no jurisdiction to make, by way of the exercise of the supervisory power of the High Court, a declaration which could not alter the commissioner's award, but would only result in two conflicting decisions subsisting, of which that in the lower court would be the effective and prevailing one. This judgment is not, in my judgment, applicable here. There has been no decision of the county court, and if this court should make a declaration, it will serve a useful purpose both in inhibiting proceedings in the county court and in binding that court on the question of law if proceedings are taken. If this court holds that the rule is unlawful it is to be expected that it will be deleted, subject always of course to the question of appeal.

My decision is fortified by the three cases cited in reply by counsel for the borough. In *Dyson v A-G* (2) in the Court of Appeal the Inland Revenue had served notices on a taxpayer requiring him to provide certain information. He refused, contending that he was under no obligation. They threatened penalties. He brought an action against the Attorney-General for a declaration that the notices and requests were ultra vires and illegal. The Attorney-General applied to strike out the statement of claim. The Court of Appeal held that the action was not only competent but was also a convenient way of providing speedy and easy access to the courts where a subject had a real cause of complaint against the purported but arbitrary exercise of statutory authority by a government department or official. In *Cooper v Wilson* (3), a watch committee purported to dismiss a police sergeant ex post facto after his service had in fact been terminated by resignation. In consequence, it refused him some payments to which he would have been entitled on resignation. It was held that he was not limited to his rights under the Police (Appeals) Act 1927 or to certiorari, but that he could ask the High Court to declare that he had duly resigned and that the watch committee had acted without jurisdiction. Apart from the narrow question of the supervisory jurisdiction of the High Court over inferior tribunals, GREER LJ made some observations supporting the utility and convenience of declarations where two parties are at issue as to their rights. It is to be observed in the present case that the borough has no other means of establishing its legal position, which is impugned. Finally, in *Sivyer v Amies* (4), a landlord had applied to the justices for an order for possession under the Small Tenements Recovery Act 1838. The tenant maintained that it was a yearly tenancy and wanted to call an old man who was too frail to come to court. The justices had no power to take evidence on commission. The landlord refused to bring his action in the county court. The tenant applied to the High Court for a declaration that it was a yearly tenancy. As the rules then stood, he could not sue in the county court for a declaration simpliciter, so,

(1) [1963] 2 All ER 693; on appeal CA [1964] 1 All ER 448.

(2) [1911] 1 KB 410; [1912] 1 Ch 158.

(3) [1937] 2 All ER 726; [1937] 2 KB 309.

(4) [1940] 3 All ER 285.



as here, he had no other means of establishing satisfactorily his legal position. CROSSMAN J refused to dismiss the action, holding that in the circumstances it was a proper procedure, not ousting the jurisdiction of the justices but being the only way in which the plaintiff could have his rights properly determined.

In my judgment the same applies here. The borough is not bound to wait and see if the board brings proceedings in the county court. The position is quite different from that which arose, for instance, in *Argosam Finance Co Ltd v Oxby (Inspector of Taxes)* (1) where it was held by PLOWMAN J that the Income Tax Act 1952, s 341, uno flatu conferred on the taxpayer a right, and provided a specific remedy and a specific tribunal for him so that he must have recourse to that tribunal only, unless and until it acted outside its jurisdiction. PLOWMAN J pointed out that *Barwick's* case (2) was distinguishable from *Barraclough v Brown* (3) on the ground that no other remedy was available.

This brings me to the substantive question of law. As I have said, rule 3 (1) of the borough's rules for transfer from the register to the housing waiting list stated: 'An applicant must be a British subject within the meaning of the British Nationality Act 1948'. That Act, by s 1, defines a British subject as including both British subjects and Commonwealth citizens. Sections 4-10 describe how persons may qualify for citizenship, by birth, descent, registration, naturalisation, and incorporation of territory. Section 32 defines an alien as a person who is not a British subject, a British protected person as defined by the same section, or a citizen of Eire. It is, therefore, clear that by its terms the borough's rule discriminates against, or excludes in effect, aliens only, and is expressed to be by reference to current nationality. I am quite satisfied that this is how the borough applies it in practice. If an alien acquires British nationality, he becomes immediately eligible for transfer to the housing waiting list if otherwise qualified. If a British born national should renounce his citizenship under s 19 of the 1948 Act, or a naturalised British subject should be deprived of his citizenship under s 20, he would become ineligible.

The borough's case is, first, that before the Race Relations Act 1968, it was plainly permissible to discriminate against or exclude aliens or, for that matter, persons of foreign birth or descent, in virtually any field, including that of housing. Counsel for the borough produced an agreed list, mainly culled from 1 Halsbury's Laws (3rd Edn) p 506, of 15 statutory restrictions of aliens; and he gave other instances where extreme discrimination could be and was lawfully employed in many fields at common law and on many grounds, including age, sex, religion, nationality, residence and qualifications. The most striking was *Re Lysaght* (4) where BUCKLEY J held that a provision in a will which founded some medical studentships, but excluded Jews and Catholics, was not against public policy or unlawful, although the judge deleted the restriction because it would, in the circumstances, have rendered the administration of the trust impracticable.

I pause here to say that I have indeed no doubt that, before the Race Relations Act 1968, the borough's rule would have been perfectly lawful. Counsel for the borough goes on to argue that this Act therefore interferes with and restricts rights previously existing at common law, as indeed it does, and, therefore, while not a penal act, it must be construed with care and a degree of strictness. He maintains that, approaching thus the construction of the phrase 'on the ground of colour, race or ethnic or national origins', the term 'national origins' does not cover a discriminatory provision on the ground of existing nationality. In brief, he says that the test of exclusion which applies is quite different, and that national like ethnic origins stem from birth (whether

(1) [1964] 1 All ER 791; *aff'd* CA [1964] 3 All ER 561, [1965] Ch 390.

(2) 85 JP 65; [1921] 1 KB 187.

(3) 62 JP 275; [1895-99] All ER Rep 239; [1897] AC 615.

(4) [1965] 2 All ER 888; [1966] Ch 191.



by territory or ancestry or both) and are unchangeable, whereas nationality can be changed, indeed, more than once. He says that the second defendant was discriminated against, not because of his foreign origins, but because he was not a British national. He is no longer discriminated against despite his foreign origin, because he is now of British nationality. He says that it would have been easy to include nationality in s 1 (1), and contrasts this omission with its inclusion in other sections to which I will refer later.

To this counsel for the board replies that the matter is not so simple. He contends that 'national origins' is a deliberately wide phrase; that in the vast majority of cases national origins and nationality are the same, because a person's national origins dictate his original nationality, and the vast majority of people retain their nationality of origin; and that therefore a discrimination on the ground of nationality essentially hits at national origin or, at the very least, renders less favourable the position of persons of foreign origin and therefore of original foreign nationality, because, in order to qualify, they have to surmount the by no means easy hurdle of naturalisation. To construe the relevant phrase as permitting discrimination on the ground of current nationality would, he says, defeat the manifest purpose of the Act, and for that matter of the Race Relations Act 1965 which employs the same definitive phrase, even if that is not the actual or conscious purpose of the plaintiffs. I may say that no one suggests that the borough's rule is a conscious sham.

Counsel for the board, too, relies on the use of particular phrases in other sections of the Act as fortifying his argument. The argument is nicely balanced. As so often happens, the canons of interpretation conflict. Statutes restricting common law rights must be carefully and jealously construed. On the other hand, words must, if possible, not be so construed as to defeat the essential objects of the statute. I can only say that, on balance, I accept the arguments of counsel for the board. Generally speaking, people must be taken to intend the natural consequences of their acts.

In my judgment, the practical effect of the borough's rule is and must be to place, for the purposes of s 5 of the Act, in a less favourable position than almost all people of British or Commonwealth origin the vast majority of people of other national origins. It is thus, in effect and in all except an insignificant number of cases a discrimination on the ground of national origins although it is not expressed in those terms. I fortify my decision by reference to the Race Relations Act 1965. In the surviving operative sections of that Act, which is to be cited with the 1968 Act, the identical definitive phrase is used, as I have already mentioned. It seems to me that it would make nonsense of s 6 of that Act to say that it would not be an offence against that section to stir up hatred by threatening, abusing or insulting, in the terms of the section 'all people who are not British subjects under the 1948 Act'.

In conclusion, I will refer to the other sections of the 1968 Act where different or extended phrases are used. As is to be expected, counsel for the borough on the one hand suggests that the use of the word 'nationality' in other sections indicates a distinction between it and national origins. Counsel for the board on the other hand contends that an exemption for a right to discriminate on the ground of nationality in certain defined cases tends to show that such discrimination would otherwise be unlawful under s 1. On the whole, I prefer the argument of counsel for the board on this point. I do not, however, regard it as a determining factor, because such saving clauses are commonly included for the avoidance of doubt or to preserve existing practices and policies by reference to their precise terms, even if these overlap the definition in the Act.

I will list these references to nationality and other words not occurring expressly in s 1. Section 3 (2) exempts restrictions on employment or qualifications imposed by existing statutes or statutory provisions. It is probably fair to say that this is aimed

mainly at saving the provisions of various statutes disqualifying aliens or limiting their number which might otherwise be thought to be repealed by this Act. Section 6 (2) saves advertisement for Commonwealth citizens for employment outside Great Britain, and for non-Commonwealth citizens for employment in Great Britain. I find this of no assistance. Section 8 (11) declares that it shall not be unlawful to select a person of a particular nationality or descent for employment requiring attributes especially possessed by people of that nationality or descent. Whatever may be the exact meaning and application of this subsection, it does, in my judgment, give some indication that such selection on the ground of existing nationality would otherwise be unlawful. Section 9 allows charitable instruments to confer benefits on persons of a particular race, descent or ethnic or national origins. The word 'descent' does not occur in s 1 (1), but on any view this seems irrelevant to the present problem. Section 27 (9) finally exempts rules to be made restricting employment in the service, of the Crown or nominated public bodies to persons of particular birth, citizenship nationality, descent or residence. This is a real mixed bag, presumably directed to the sort of limitations traditionally imposed. It does not help me in my task inasmuch as some of the limitations mentioned are clearly within, and one (i.e. residence) is clearly outside, the terms of the governing phrase in s 1 (1).

For the above reasons, I hold that I have jurisdiction, and I would exercise my discretion to grant one or more of the declarations if I considered that the borough's argument on the substantive question was well founded in law. In my judgment it is not, and I refuse to make any declaration.

*Order accordingly.*

Solicitors: Sharpe, Pritchard & Co, for J E Mantle, Ealing; Lawford & Co.

G.F.L.B.

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### PRIVY COUNCIL

(LORD DIPLOCK, LORD DEVLIN AND VISCOUNT DILHORNE)

3rd November 1970

HALL v REGINAM

*Criminal Law—Evidence—Confession—Defendant informed that third person has accused him of offence—No explanation or disclaimer.*

A person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence; a fortiori he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation.

*R. v Feigenbaum* (1919), 83 J.P. 123, disapproved.

APPEAL by Dennis Hall from a decision of the Court of Appeal for Jamaica dismissing an appeal against his conviction by the resident magistrate of the parish of St Andrews of being in unlawful possession of a dangerous drug.

*B Sinclair* for the appellant.

*S G Davies* for the Crown.

**LORD DIPLOCK:** The appellant, Dennis Hall, was charged before the resident magistrate for the parish of St Andrews jointly with two other defendants, Daphne Thompson and Daisy Gordon, that they unlawfully had in their possession a drug, ganja. The evidence against the appellant was that early in the morning a search was made of a two-roomed building in the parish of St Andrews at which it was said the three defendants lived together. At the time of the search one room was occupied by Daisy Gordon and the other by Daphne Thompson. In Daisy Gordon's room packets of ganja were found in a brown grip and a blue brief case. Daisy Gordon admitted that the grip was hers, but denied all knowledge of the ganja found in it. Packets of ganja were also found in a shopping bag in Daphne Thompson's room. She said that the shopping bag had been brought there by the appellant. The appellant was not on the premises when the search was in progress, but he was brought there shortly afterwards by another police officer. He was told by the officer who had conducted the search that Daphne Thompson had said that the ganja belonged to him. He made no comment on this. He remained silent. All three defendants were then cautioned and none of them said anything.

At the conclusion of the prosecution's evidence, it was submitted on behalf of the appellant that the evidence disclosed no case against him. The resident magistrate ruled that there was a case to answer. The defendants gave no evidence and called no witnesses. The appellant and Daphne Thompson made statements from the dock denying all knowledge of the matter and Daisy Gordon said that she wished to say nothing at all. The resident magistrate found all defendants guilty and sentenced the appellant to three years' hard labour. All three defendants appealed to the Court of Appeal. The appeal of Daphne Thompson was allowed on the grounds that it was not established beyond any reasonable doubt that she knew what was in the shopping bag and furthermore she had immediately disclaimed ownership of the bag. The appeals of Daisy Gordon and the appellant were dismissed. From this dismissal the appellant appeals in forma pauperis by special leave of their Lordships' Board.

The Court of Appeal held that, although there was some evidence of joint occupancy of the house,

'if the matter had rested on that alone the court would be of the view that the conviction would be unsafe as that evidence would have been too tenuous on which to have founded a conviction for possession of the ganja found in the house.'

They held, however, that the appellant's silence when told of the accusation made against him by Daphne Thompson amounted to an acknowledgment by him of the truth of the statement which Daphne Thompson had made. At the hearing before this Board counsel for the Crown has sought to uphold the conviction, not only on the ground accepted by the Court of Appeal but also, in the alternative, on the ground which was rejected by the Court of Appeal, namely, that the evidence of the appellant's occupancy of the premises was sufficient to support the conviction. Their Lordships would not think it right to allow this latter point to be re-opened before this Board. It raises no point of law of general public interest and is dependent on inferences to be drawn from local knowledge of living conditions in Jamaica with which the Court of Appeal is familiar and this Board is not. They will accordingly deal only with the question whether the appellant's silence in the circumstances outlined above constituted evidence on which he could properly be convicted of the offence with which he was charged. This was the ground on which special leave to appeal was granted by their Lordships.

In dealing with this question, the Court of Appeal cited the following paragraph from Archbold, Pleading Evidence and Practice in Criminal Cases, 37th edn., para. 1126.

'A statement made in the presence of an accused person, accusing him of a crime, upon an occasion which may be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save in so far as he accepts the statement so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amount to an acceptance of it in whole or in part.'

This statement in their Lordships' view states the law accurately. It is a citation from the speech of LORD ATKINSON in *R v Christie* (1). But their Lordships do not consider that in the instant case the Court of Appeal applied it correctly. It is not suggested in the instant case that the appellant's acceptance of the suggestion of Daphne Thompson which was repeated to him by the police constable was shown by word or by any positive conduct, action or demeanour. All that is relied on is his mere silence.

It is a clear and widely-known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. A fortiori he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordships' view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation. This is well established by many authorities such as *R v Whitehead* (2) and *R v Keeling* (3). Counsel has sought to distinguish these cases on the ground that in them the accused had already been cautioned and told in terms that he was not obliged to reply. Reliance was placed on the earlier case of *R v Feigenbaum* (4) where the accused's silence when told of the accusation made against him by some children was held to be capable of amounting to corroboration of their evidence. It was submitted that the distinction between *R v Feigenbaum* and the later cases was that no caution had been administered at the time at which the accused was informed of the accusation. The correctness of the decision in *R v Feigenbaum* was doubted in *R v Keeling*. In their Lordships' view the distinction sought to be made is not a valid one and *R v Feigenbaum* ought not to be followed. The caution merely serves to remind the accused of a right which he already possesses at common law. The fact that in a particular case he has not been reminded of it is no ground for inferring that his silence was not in exercise of that right, but was an acknowledgment of the truth of the accusation.

It follows that in their Lordships' view there was no evidence on which the resident magistrate was entitled to hold that the charge against the appellant was made out. Their Lordships have humbly advised Her Majesty that this appeal should be allowed and the appellant's conviction quashed.

Conviction quashed.

Solicitors: T L Wilson & Co; Charles Russell & Co.

G.F.L.B.

(1) 78 JP 321; [1914-15] All ER Rep 63; [1914] AC 545

(2) 92 JP 197; [1928] All ER Rep 186; [1929] 1 KB 99.

(3) 106 JP 147; [1942] 1 All ER 507.

(4) 83 JP 123; [1918-19] All ER Rep 489; [1919] 1 KB 431.

COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW, LJ, CANTLEY AND CHAPMAN, JJ)

16th October and 3rd November 1970

R v LAWRENCE

*Criminal Law—Theft—Ingredients of offence—Consent of owner obtained by dishonesty—Facts proved justifying conviction of obtaining property by deception—No bar to conviction for theft—Theft Act, 1968, s 1 (1), s 2 (1) (b), s 15 (1).*

A charge of theft under s 1 (1) of the Theft Act, 1968, contains four ingredients only which must be proved by the prosecution: (i) a dishonest, (ii) appropriation (iii) of property belonging to another (iv) with the intention of permanently depriving the owner of it. The prosecution are not required further to prove absence of consent of the owner of the property. In a case of true consent to the act or acts complained of, the essential element of dishonesty would not be established, but apparent consent brought about by dishonesty affords no defence.

The fact that a charge could have been brought on the facts proved of obtaining property by deception under s 15 (1) of the Act, which covers both of the old offences of obtaining by false pretences and larceny by a trick, in no way operates to prevent the charge from being validly laid as theft under s 1 (1).

APPEAL by Alan Lawrence against his conviction of theft, contrary to the Theft Act 1968, s 1 (1), at Inner London Quarter Sessions.

J R P Penry for the appellant.

D W T Price for the Crown.

*Cur adv vult*

3rd November. **MEGAW LJ** read this judgment of the court: The appellant, Alan Lawrence, was convicted at Inner London Quarter Sessions on 2nd December 1969 on an indictment alleging theft. The particulars were that on 1st September 1969 he stole the approximate sum of £6, the property of Eugenio Occhi. He was fined £35 with three months' imprisonment in default. He was ordered to make compensation to Mr Occhi in the sum of £6 9s 6d. He appeals against conviction. The appellant is a taxi driver. Eugenio Occhi is an Italian. At the relevant time he was a student, 18 years of age. He spoke very little English. On 1st September 1969, he arrived at Victoria station in London. It was his first visit to England. He wanted to go to Ladbroke Grove. Outside Victoria station there was a queue of taxis at the taxi picking-up point. Mr Occhi saw another taxi standing a little distance away from the queue. He went to it. The driver of that taxi was the appellant. Mr Occhi showed the appellant a piece of paper on which was written the address in Ladbroke Grove. The appellant said that it was very far and very expensive. Mr Occhi got into the taxi. He took out his wallet and tendered a £1 note to the appellant. The appellant said that it was not enough. The wallet was still open and the appellant himself proceeded to take out of it a further £1 note and a £5 note. He had thus got possession of £7 from Mr Occhi. He then drove Mr Occhi to the address in Ladbroke Grove, where Mr Occhi got out and went into the Italian centre there, which was his destination. The correct lawful fare for that journey was 10s 6d, or perhaps a little more if there was waiting time.

Those were the essential facts put forward by the prosecution. One or two answers given by Mr Occhi in the course of his evidence have been referred to by counsel for the appellant and they should, therefore, be mentioned. In cross-examination Mr Occhi was asked whether he minded paying, to which he replied: 'I did not

mind, but it was the only means of travel.' Whether that question and the answer to it advanced the matter much may be open to doubt. He was also asked, presumably in re-examination, whether he would have paid if he had known the real fare was about 10s. His answer was 'No'. When he was asked by counsel for the appellant whether he had consented to the money being taken, he said (his evidence being given through an interpreter) that he had 'permitted'. Again this question and answer may not be of much assistance in the absence of an exposition of the meanings to be attached to 'consented' and 'permitted'. It is accepted that Mr Occhi offered no physical resistance to the appellant when the latter helped himself to the further £6 from the wallet, and that he did not seek to get out of the cab or ask for the return of the money.

The remainder of the evidence related to the issue, which was the sole issue of fact raised by the defence, whether or not the appellant was indeed the taxi driver with whom Mr Occhi had had these dealings. The jury plainly rejected the appellant's evidence that it was not he and that he knew nothing about this affair. There is not, and could not be, any criticism of the direction by the deputy chairman to the jury on the question of identity. That question is, therefore, no longer in issue.

A submission was made at the close of the evidence for the prosecution that the appellant could not in law, on the evidence adduced, be convicted on this indictment charging theft under s 1 (1) of the Theft Act 1968. That submission was rejected by the deputy chairman. The Theft Act 1968 was enacted, as the preamble states, 'to revise the law' as to theft and similar or associated offences. It was based on the Eighth Report of the Criminal Law Revision Committee, presented to Parliament in May 1966. As is well known, the primary purpose of the Act was to remove certain notorious difficulties and uncertainties in this branch of the law which had led LORD GODDARD CJ in *Russell v Smith* (1) to describe the law as it then was as 'a law which is exceedingly technical', and to quote a statement in an article in the Law Quarterly Review that some of the decided cases were

'a public scandal both because the courts are reluctantly compelled to allow dishonesty to go unpunished, and because of the serious waste of judicial time involved in the discussion of futile legal subtleties.'

It is to be hoped that it will not be found that the provisions of the 1968 Act necessitate the introduction of fresh technicalities or legal subtleties.

For the appellant it is contended that on the evidence in this case s 1 (1) of the Theft Act 1968 does not apply; the appellant could not be convicted of theft under that section, under which the indictment was laid; the submission of no case should have been accepted by the deputy chairman and the jury directed to bring in a verdict of not guilty. The main basis of that submission was that Mr Occhi consented to the money being taken by the appellant and where there is consent no offence under s 1 (1) is committed; further, even if the deputy chairman was entitled to leave the case to the jury, he should have directed them, as he did not, that consent would provide a complete defence. The provisions of the Theft Act 1968 relevant to that submission are these:

'1. (1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.

'2. (1) A person's appropriation of property belonging to another is not to be regarded as dishonest—(a) if he appropriates the property in the belief that he

(1) 121 JP 538; [1957] 2 All ER 796; [1958] 1 QB 27.



has in law the right to deprive the other of it, on behalf of himself or of a third person; or (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it ...'

Section 3 (1) deals with 'appropriation'. It begins with these words: 'Any assumption by a person of the rights of an owner amounts to appropriation ...' Section 4 (1) defines 'property' as including money and all other property, real or personal. There is thus no technical significance in the word 'property' in s 1 (1) such as the word sometimes bears in lawyers' language.

In the argument before us reference was also made to s 5 (4), which we do not regard as relevant to the present issue, and to s 15 (1) to which we shall refer later. Theft, under the terms of s 1 (1) involves four elements: (i) a dishonest (ii) appropriation (iii) of property belonging to another (iv) with the intention of permanently depriving the owner of it. On the facts, no question could possibly arise as regards any of these elements. No one could possibly doubt the dishonesty of the appellant's conduct. Nor, in view of the words of ss 3 (1) and 4 (1) already quoted, could there be any serious argument that there was not an 'appropriation', and an appropriation of 'property'. As we understand the argument, counsel for the appellant did not dispute any of these matters. He did, however, contend that there must be implied into the subsection a requirement that the dishonest appropriation must be without the consent of the owner of the property. In our view, no such implication is justified. The words contained in the former definition of larceny, in s 1 of the Larceny Act 1916, 'without the consent of the owner', have been omitted, and, we have no doubt, deliberately omitted, from the definition of theft in the 1968 Act. If the owner does not resist the taking of his property, or actually hands it over, because of, e.g. threats of violence, in one sense it could be said that there is 'consent', yet the offence of robbery as defined in s 8 (1) of the 1968 Act involves, as one of its elements, theft. Again, the former offences of larceny by a trick and obtaining property by false pretences, although technically distinct offences under the old law, both involved what in one sense could be described as 'consent' by the victim. It was conceded by counsel for the appellant, necessarily and rightly, that the old offence of larceny by a trick is covered by s 1 (1) of the 1968 Act as well as by s 15 (1) to which we shall refer later, despite what may be called the apparent consent of the victim.

Of course, where there is true consent by the owner of property to the appropriation of it by another a charge of theft under s 1 (1) must fail. This is not, however, because the words 'without consent' have to be implied in the new definition of theft. It is simply because, if there is such true consent, the essential element of dishonesty is not established. If, however, the apparent consent is brought about by dishonesty, there is nothing in the words of s 1 (1), or by reason of any implication that can properly be read into those words, to make such apparent consent relevant as providing a defence. The prosecution have to prove the four elements already mentioned, and no more.

No inference to the contrary is to be drawn from the words of s 2 (1) (b), already quoted. That reference does no more than show that the essential element of dishonesty does not exist if the defendant when he appropriates the property believes that the owner would consent if he knew the circumstances. 'The circumstances' are, of course, all the relevant circumstances. 'The belief' is an honest belief. That paragraph does not give rise to the inference that an appropriation of property is not theft when there is a 'consent'—if it can be rightly so described—which is founded on the dishonesty of the defendant. The primary submission on behalf of the appellant therefore, fails.

In the submission at the trial, it would seem that it was contended on behalf of the appellant that the facts would, or might, have justified a charge being brought under s 15 (1) of the Theft Act 1968. That subsection, which defines the offence of obtaining property by deception, reads:

'A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.'

It was then contended that, assuming the offence amounted to obtaining property by deception, it was of the nature which, before the new Act, would have amounted to obtaining property by false pretences and not to larceny by a trick. It was then argued that, since the provisions for alternative verdicts previously contained in s 44 (3) and (4) of the Larceny Act 1916 have found no counterpart in the Theft Act 1968, the appellant could not be convicted on this indictment. Section 6 (3) of the Criminal Law Act 1967 could have no application, and this latter point, as to s 6 (3), was indeed conceded before this court by counsel for the prosecution.

In this court, counsel for the appellant contended that on the facts of this case the prosecution could not have succeeded even if the indictment had been laid under s 15 (1). In the view of this court, if the indictment had been laid under s 15 (1), the jury could, indeed, have convicted of that offence. Had the old law still prevailed, the offence would have been obtaining by false pretences, not larceny by a trick. But under the new law both those old offences are covered by s 15 (1). The court sees no ground for saying that, for present purposes, it makes the slightest difference whether under the old law the offence would have been false pretences or larceny by a trick. The old and unsatisfactory distinction is not to be perpetuated unnecessarily where the language of the Theft Act 1968 does not require it. There is no magic in the word 'property' in s 1 (1) in view of the definition in s 4 (1) of the Act. In either case, the fact that a charge could have been brought under s 15 (1), which covers both, in no way operates to prevent the charge being validly laid as theft under s 1 (1) if the prosecution can prove what they must prove, as previously described, under that subsection. This is conceded in respect of an offence which would once have been larceny by a trick. It applies equally to what would once have been obtaining by false pretences, if, as is here the case, the requirements of s 1 (1) are also satisfied. That submission also fails.

It may be that the result of our decision is that in any case where the facts would establish a charge under s 15 (1) they would also establish a charge under s 1 (1). The alternative, however, involves the writing back into s 1 (1) of the words which the legislature, no doubt deliberately, omitted, and the reintroduction into the criminal law of the distinction between larceny by a trick and obtaining by false pretences. Counsel for the appellant sought to support his submission that no charge lay under the Theft Act 1968, by reference to the fact that what the appellant had done constituted an offence or offences under other legislation. We were not referred specifically to the relevant Acts, but the reference must be to various Acts including the Metropolitan Public Carriage Act 1869, the London Cab and Stage Carriage Act 1907 and the London Cab Act 1968, and regulations made thereunder. It may be accepted that the appellant committed one or more offences under that body of legislation, consisting of, or including, the offence of demanding more than the authorised fare. This court sees no reason why that fact should be regarded as excluding trial and conviction under the Theft Act 1968, if, as is the case, the facts constitute an offence under the 1968 Act. The appeal is dismissed.

*Appeal dismissed.*

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police. T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD) PARKER, CJ, ASHWORTH AND CANTLEY, JJ)

5th, 6th November 1970

MAURICE BINKS (TURF ACCOUNTANTS) LTD v HUSS

*Gaming—Betting—Office—Advertisement—'Premises giving access to a licensed betting office'—Display of sign on outside wall—Sign showing company's registered name and containing words 'turf accountants'—Indication that premises were licensed betting office—Betting (Licensed Offices) Regulations, 1960, reg 2—Betting, Gaming and Lotteries Act, 1963, s 10 (5) (a), (b).*

By s 10 (5) of the Betting, Gaming and Lotteries Act, 1963, the publication of an advertisement indicating that any premises are a licensed betting office is prohibited 'save in a licensed betting office or in such manner as may be prescribed on premises giving access to such an office'.

By reg 2 of the Betting (Licensed Offices) Regulations, 1960, the holder of a betting office licence may exhibit 'elsewhere than inside a building comprising the licensed premises' a notice in addition to his name consisting of the words 'licensed betting office' and indicating the times when the office is open.

The appellants were a private limited company carrying on business as bookmakers and held a betting office licence. The words 'turf accountants' appeared in their registered name which had been adopted with the consent of the Board of Trade. On the outside wall of the shop in which they conducted their business they fixed a sign bearing the words 'Maurice Binks Turf Accountants' (their registered name) and a picture of a racehorse passing the winning post. Justices convicted the appellants on an information charging them that, being the licensees of a licensed betting office, they published an advertisement in connection with the office, contrary to s 10 (5) of the Act of 1963. On appeal by the appellants,

**HELD:** (i) the use of the appellants' name in compliance with s 108 of the Companies Act, 1948, could be an 'advertisement' within the meaning of s 10 (5) of the Act of 1963; (ii) the words 'licensed betting office' and 'licensed premises' were synonymous despite reg 2 of the 1960 regulations, and it was accordingly impossible to treat the outside wall of the betting office as constituting 'premises giving access to' the office inside; (iii) s 10 (5) must be strictly construed with regard to the meaning of the word 'indicating' which must be interpreted as meaning 'showing'; accordingly, the sign, to come within the prohibition, must be a statement of fact there was nothing in the present case on the sign to state as a fact that the premises to which it was attached were a licensed betting office; and so there was no contravention of s 10 (5), and the conviction must be quashed.

**CASE STATED** by Darlington justices.

The respondent, Allan Whittaker Huss, an inspector of police, preferred an information against the appellants, Maurice Binks (Turf Accountants) Ltd, charging that the appellants, being the licensees of a licensed betting office at 6 Duke Street, Darlington, published an advertisement in connection with the office, namely a sign affixed to the outside wall of the premises bearing the words 'Maurice Binks (Turf Accountants) Limited', contrary to s 10 (5) of the Betting, Gaming and Lotteries Act 1963.

The justices decided that in everyday parlance the term 'turf accountant' was synonymous with the word 'bookmaker'; the business of a bookmaker was to take bets; bets were taken at betting offices; the sign advertised the registered name of the appellants and at the same time advertised the nature of the appellants' business; and the indication of the appellants' business by means of the sign was an indication that the premises to which it was attached were a betting office. They accordingly convicted the appellants, who appealed to the Divisional Court.

*P M J Slot* for the appellants.

*M Graham* for the respondent.

**ASHWORTH J:** This is an appeal from a decision of justices for the county borough of Darlington before whom the appellants were brought by way of an information charging an offence against s 10 (5) of the Betting, Gaming and Lotteries Act 1963. The precise words of the information are set out in the Case Stated, and no point is taken that they do not appear to follow the wording of the section itself. The issue involved in the case can be very shortly stated. The appellants are a private limited company carrying on business as bookmakers at 6 Duke Street, Darlington and indeed they have carried on business there for a considerable time. The name Maurice Binks (Turf Accountants) Ltd was adopted with the consent of the Board of Trade in 1965, after other names not containing the words 'turf accountants' had been refused by the Board. It is not without interest to know that before the sign complained of in the present case was erected, a director of the appellants had been in touch with the police at Darlington and at that time, as long ago as 1966, no objection at all was raised by the police authorities to the sign itself, some comment being made as to its size. But the police at Darlington became aware of the decision of this court in *Roy William Robinson Ltd v Cox* (1) which was decided on 22nd October 1968. That prompted them to look into the matter again, and as a result the respondent, in his capacity as chief inspector of police, discussed it with a director of the appellants and failed to persuade the director to alter the sign; accordingly these proceedings were brought.

The Case includes a photograph of the shop front at 6 Duke Street, Darlington, and the photograph is an excellent portrayal of the sign in question, which contains by way of letters 'Maurice Binks (Turf Accountants) Limited' and as if to guard against the unlikely possibility that someone in Darlington did not know what a turf accountant was there is a picture of a race-horse passing the winning post close by. It is to my mind as plain as plain can be that anyone looking at that notice would know that Maurice Binks (Turf Accountants) Ltd were bookmakers, and indeed the opposite was not argued at all.

The way in which this matter comes before the court is that s 10 (5) of the Betting, Gaming and Lotteries Act 1963 prohibits the publication of an advertisement indicating that any particular premises are a licensed betting office, save in a licensed betting office or in such manner as may be prescribed on premises giving access to such an office. It is said by the respondent that this sign is an advertisement and that in its position in Duke Street, Darlington, it indicates that the premises to which it is attached are a licensed betting office.

The justices accepted that argument, but they proceeded on a footing with which I confess I am quite unable to agree. Let me dispose of that before going further. Their reason is to be found in the Case where they state:

'In every day parlance the term "turf accountant" is synonymous with the word "bookmaker". If we may state the obvious, the business of a bookmaker is to take bets. Bets are taken at betting offices. The said sign advertised the registered name of the [appellants] and at the same time advertised the nature of the [appellants'] business',

and therefore, they said as a corollary to that, that the indication of the appellants' business by means of the sign was an indication that the premises to which it was attached were themselves a betting office. This completely overlooks the possibility that bookmakers, turf accountants, may carry on business at places which are not licensed betting offices, and that there are at least two forms of betting, credit betting and cash betting.

While I disagree with the justices in that approach to the matter, the

(1) (1968), 67 LGR 188.

issue is still before the court whether, looking at that sign, it can be fairly said, within the meaning of s 10 (5), that it is an indication that the premises are a licensed betting office. In support of the appeal counsel for the appellant had three submissions to make, only one of which in my view is really of any substance. His first, which it is fair to say he did not press with any conviction, was that this was not an advertisement at all; it was merely the use of the appellants' name in compliance with s 108 of the Companies Act 1948. He conceded that it might have been smaller, indeed he called attention to the plate which is just visible on the door of the premises giving the appellants' name, but he said that it would be a misuse of words to call this an advertisement when it was merely a compliance with s 108.

I would only say that for my part I am content to take the same view as was expressed by LORD PARKER CJ in *Robinson v Cox* (1) where he said:

'No doubt what does or does not constitute an advertisement in any case depends upon the nature of the case and the nature of the legislation being considered, but for my part I find it quite impossible to say that this sign is not an advertisement within the subsection; indeed it seems to me plainly to fall within the words used "any advertisement indicating that any particular premises are a licensed betting office".'

In passing I should mention that in that case the sign in question used the words 'licensed betting office' and added 'open 11 a.m. daily'. Therefore unless the bookmaker could escape under some provision of the Betting (Licensed Offices) Regulations 1960 he was plainly in contravention of s 10 (5). So for my part I would not accept counsel for the appellant's first point.

His third point was an effort to persuade this court that the decision to which two at least of the present members of the court were party, given in *Cox's* case was, if not distinguishable, at any rate open to review. This argument depends on a consideration of the regulations and the provisions in s 10 (5) to this effect: 'in such manner as may be prescribed on premises giving access to such an office.' Counsel for the appellants sought to persuade the court that the roof of a building and the wall of a building properly regarded can be called premises giving access to the licensed betting office because he says that 'premises' by definition in the Act means 'place' and a wall is a place. Once again, I find it quite unnecessary to go further than to read what LORD PARKER CJ said in *Cox's* case dealing with a similar argument:

'In support of that he refers to the fact that regulation 2 appears at first sight to be drawing a distinction between a licensed betting office and licensed premises. In my judgment, however, these words are really synonymous, and it is quite impossible to treat the outside wall of the betting office itself, to which this advertisement or notice was fastened, as constituting premises giving access to the office which was the inside of that wall. It seems to me quite unreal to suggest that the outside wall constitutes premises giving access to what is the other side of the wall.'

On that occasion I agreed, and I do no more than repeat my agreement with those words.

That disposes of two of counsel for the appellants' points and one now comes to the one that is of substance is to the effect that, whatever else this sign is, it is not an advertisement indicating, under s 10 (5) (a), that any particular premises are a licensed betting office. It is perfectly true to say that there is nothing whatever on the sign of itself expressly to indicate the premises are a licensed betting office.

It is only by an extended use of the word 'indicating' that any substance can be found in the case put forward by the prosecution.

Counsel for the respondent has called the court's attention to the fact that in the Concise Oxford Dictionary two meanings are given to the word 'indicate'. The first meaning is one which clearly in this case does him no good at all, a meaning which is: 'Point out, make known, show.' But he refers to the secondary meaning which is: 'Suggest, call for; state briefly; be a sign of, betoken.' He says that this sign at least suggests that the premises to which it is affixed are a licensed betting office. If I may say so, that is a plausible argument, attractively presented, but it is without any foundation whatever. The only comfort which he could gain in presenting the argument was from some words which (ill-advisedly) I myself used in giving judgment in *Dunsford v Pearson* (1). They were obiter dicta, and like many obiter dicta they provide cause for subsequent regret. They were wrong. The words in question are these:

'It is quite plain that, so far as s 10 (5) of the Act is concerned, it would be unlawful for the licensee to place an advertisement outside his premises giving, for example, the information given in the present case, and so much was held by this court in *Robinson v Cox* (2) of which this court has been supplied with a transcript.'

Factually that sentence is wrong, and I regret it because the sign in *Robinson v Cox* included the words 'licensed betting office' and the court had no difficulty in saying that that involved a contravention of s 10 (5). But the sign used in *Dunsford v Pearson* was a sign similar in form, although different in character, to that in the present case. It merely used the words 'turf accountants'. It was quite unnecessary for the decision in *Dunsford v Pearson* to say that it involved an offence under s 10 (5), and, on further reflection, I think that the sentence which I have quoted was wrong.

'Indicating' in my view in the subsection means 'showing'. It involves the first of the two meanings put forward by counsel for the respondent and it is to be noted that in s 10 (5) the word is used twice in para (a) 'indicating that any particular premises are a licensed betting office' and, secondly, in para (b) 'indicating where any such office may be found'. In para (c), although the word is not used, the expression is 'drawing attention to the availability of, or to the facilities afforded to persons resorting to, such offices'.

In my judgment, the use of the word 'indicating' in paras (a) and (b) is a use which is within the first meaning; it is not a case of 'suggesting', and I am confirmed in that approach to the matter by the fact that the subsection and the paragraph use these words 'indicating that any particular premises are a licensed betting office'. It involves to my mind the proposition that the sign must be, so to speak, a statement of fact, and in this case there is nothing on the sign to state as a fact that the premises to which the sign is attached are a licensed betting office. To avoid misunderstanding let me say at once, it could suggest to people passing along Duke Street, Darlington, that this may be a place where they can make a bet for cash, but what is penalised in s 10 (5) is an advertisement indicating, not that the premises may be, but that they are, a licensed betting office.

In my view, having regard to the nature of the Act and the penal character of the offence, it would be wrong to tread outside the strict wording of the subsection, and make it cover cases which are not within its strict language. Accordingly, in my view the sign 'Maurice Binks (Turf Accountants) Limited' did not involve the appellants

(1) 134 JP 180; [1970] 1 All ER 282.

(2) (1968), 67 LGR 188.



in a contravention of s 10 (5), and I would be in favour of allowing this appeal and quashing the conviction.

**CANTLEY J:** I agree.

**LORD PARKER CJ:** I also agree.

*Conviction quashed.*

Solicitors: *Denis Hayes & Co*, for Stanley N Walton & Hardy, Darlington; *Clarke, Rawlins & Co*, for Waldy, Chaytor & Jacks, Darlington.

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, ASHWORTH AND BROWNE, JJ)

30th October, 13th November 1970

MYRDDIN-BAKER v TEESSIDE COUNTY BOROUGH COUNCIL (No 2)

*Local Government—Loss by officer of employment—Compensation—Merger of council with other councils to form county borough—Loss of employment of clerk and solicitor—Resettlement and long term compensation—Local Government (Compensation) Regulations, 1963, regs 8, 14 (1) (c) (f).*

The appellant was for 17 years clerk and solicitor to a rural district council which was merged with other councils to form a county borough to which the appellant was transferred. Having been given notice to terminate his employment he began to work as a salaried partner in a firm of solicitors. His salary in that capacity was agreed at £1,500 a year, but after nine months he had received emoluments amounting to £333 only.

**HELD:** in assessing his re-settlement compensation under reg 8 of the Local Government (Compensation) Regulations, 1968, there should be deducted from the basic figure for the compensation two-thirds of the £333 actually received by him and not two-thirds of the £1,500 payable to him; as to his long-term compensation, in considering under reg. 14 (1) (c), and (f) the extent to which he had sought suitable employment and the emoluments he might have acquired vacancies arising in any local authority employment, or in the same local authority employment, should not be excluded, and consideration under reg. 14 (1) (f) of 'all the other circumstances of the case' should not be confined to matters arising after his loss of employment.

**APPEAL** by Thomas Myrddin-Baker from a decision of the Industrial Tribunal pronounced on a re-hearing of the appellant's appeal against the assessment made by the respondents, Teesside County Borough Council, of his claim for resettlement and long-term compensation under the Local Government (Compensation) Regulations 1963.

By reg 8 (1) of the Local Government (Compensation) Regulations, 1963: '... resettlement compensation payable to a person to whom this Part of these regulations applies shall for each week for which such compensation is payable be a sum ascertained by taking two thirds of the weekly rate of the net emoluments which the claimant has lost and deducting therefrom such of the following items as may be applicable:—... (b) two thirds of the net emoluments received by him in respect of

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ROAD TRAFFIC - Driving with blood-alcohol proportion above prescribed limit - Specimen for laboratory test - Failure to supply - Reasonable excuse - Excuse relating to blood specimen only - Liability to supply specimen of urine - Direction to jury - Road Safety Act, 1967, s 3 (3) (6). R v Harling .. .. .	CA	29
TOWN AND COUNTRY PLANNING - Permission - Refusal - Authority required to purchase land - Compensation - Assessment. Margate Corporation v Devotwill Investments Ltd .. .. .	HL	19
TRADE DESCRIPTION - False description - Milk - Foil cap on bottle accurately describing milk and bearing retailer's name - Names of milk suppliers to whom bottle belonged embossed on bottle - Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1). Donnelly v Rowlands .. .. .	QBD	100

such week from work or employment undertaken in place of the employment which he has lost . . .'

For reg 14 (1) (c) and (f) see p 155, post.

*J M Rankin QC* and *J G C Phillips* for the appellant.

*G E Moriarty* for the respondents.

*Cur adv vult*

13th November. **LORD PARKER CJ** read the following judgment: This is an appeal from a decision of the Industrial Tribunal given on 5th May 1970, a decision given after the remission to the tribunal by this court on 28th January 1970 (1). It concerns the quantum of the appellant's entitlement to resettlement compensation and long-term compensation under the Local Government (Compensation) Regulations 1963. The full facts leading up to the claim and the decision of this court have been reported (1). As appears from that decision, the court understood that the original arrangement whereby the appellant was entitled to a salary of £1,500 was changed and that all he had become entitled to was the sum actually drawn by him. It was in these circumstances that the court remitted the case back to the tribunal to determine resettlement compensation on the basis of the amount actually received, i.e., under the changed arrangements. At the same time the court also remitted the determination of long-term compensation since this might be affected by this changed arrangement.

When the matters were so remitted, the tribunal, as appears from the decision now under appeal, heard further evidence as a result of which the tribunal found that the original arrangement had not been changed. The appellant was at all material times, and is, entitled to a salary of £1,500, but has deferred receipt of it. It had been originally contemplated that further overdraft facilities could be obtained from the bank out of which his salary could be paid. When, however, such facilities were not forthcoming, the appellant was content only to draw small sums to the extent that profits allowed, and did not insist on payment of the salary in full, which would have had to come out of his partners' pockets. It was in these circumstances that the tribunal held, as it originally had, that for the purposes of resettlement compensation two-thirds of the salary received, i.e., £1,000, fell to be deducted. If, however, it was wrong in this, the tribunal held that two-thirds of £333, being the amount actually received by drawings, fell to be deducted.

It has been urged before us that the tribunal was wrong in deducting two-thirds of £1,500 in that on the facts, although the appellant was entitled to a salary of £1,500, no part of it except the £333 had been paid or received by him. It is necessary in this connection to consider the relevant regulations in some detail.

Regulation 8 provides how the amount of resettlement compensation is to be ascertained. In order to understand how the calculations have to be made, it is convenient to consider the process by stages. In this connection it is to be noted that the compensation is to be ascertained for each week for which it is payable.

Stage 1. One has to ascertain the weekly rate of the net emoluments which the claimant has lost. Both 'emoluments' and 'net emoluments' are defined in reg 2. Omitting unnecessary words 'emoluments' means all salary and other payments paid to an officer for his own use. The word 'paid' is in my view used in contrast to the words 'credited' or 'payable': it denotes actual payment. 'Net emoluments' is given two meanings of which only heading (a) is relevant in Stage 1. Under heading (a) it means the annual rate of the emoluments of the employment immediately

(1) See 134 JP 354.

before the loss. Applying the definition of 'emoluments', this definition in heading (a) means the annual rate of all salary and other payments paid to an officer for his own use immediately before the loss. Having found the annual rate, one has to ascertain the weekly rate and reg 8 (3) provides that this shall be deemed to be  $\frac{7}{365}$ ths of the annual rate.

Stage 2. Having ascertained the weekly rate of the net emoluments lost, one has to calculate two-thirds of it and the resultant figure is the basic figure for resettlement compensation. If no deductions fall to be made therefrom, the claimant is entitled to that sum for each week for which compensation is payable.

Stage 3. The only deduction relevant to the present appeal is to be found in reg 8 (1) (b):

'two thirds of the net emoluments received by him in respect of such week from work or employment undertaken in place of the employment which he has lost'

The use of the words 'net emoluments' in this paragraph introduces the second meaning of those words to be found in heading (b) of the definition in reg 2. Again applying the definition of 'emoluments', this definition in heading (b) means the annual rate of all salary and other payments paid to the claimant for his own use at the time in question. It is to be noted that the deduction mentioned in reg 8 (1) (b) is not expressed in the same form as is used to calculate the basic figure. Paragraph (b) does not refer to the 'weekly rate of the net emoluments . . . lost': it refers to the 'net emoluments received by him in respect of such week'. The combination of the word 'paid' (involved in the definition of 'emoluments') and the word 'received' in para (b) leads me to the conclusion that the deduction contemplated in the paragraph is a deduction of a sum actually paid and received in respect of any week included in the basic figure. It is for this reason probably that para (b) does not refer to the 'weekly rate of the net emoluments': if it had done so, it would have been easier to give a wider meaning to the word 'received'.

One of the main contentions advanced against this construction of reg 8 was that it would allow a claimant to refrain from drawing in this new employment sums to which he was entitled. In this way he would recover compensation without any deduction being made under para (b) and thereafter draw from his employment salary covering the same weeks as those for which he received compensation. It is clear from the reasons given by the tribunal that it was impressed by this contention, and, as it says, there is common sense in the argument. In order to meet it, counsel for the appellant suggested that in such circumstances it might be held that the appellant received such deferred salary in trust for the compensating authority. Alternatively he submitted that the authority might have some right of subrogation against the appellant's employers in respect of the deferred salary. For my part I do not consider that either of these methods of escaping from the difficulty that the appellant may in effect be paid twice over would achieve success, though it is not necessary to express a final opinion about either.

While I fully appreciate the force of the argument based on the possibility of double payment, I am unable to agree with it. It involves reading the word 'received' in para (b) as including 'receivable' or 'credited' and in my view that construction is not legitimate. It is worth emphasising that resettlement compensation, payable for a maximum of 26 weeks, is a short-term method of enabling an officer who has suffered loss to tide over the period immediately following his loss. He need not work at all or can work without remuneration and yet draw compensation amounting to two-thirds of his salary prior to dismissal. It would be natural in those circumstances to provide that, if he does work and is paid remuneration, the compensation should

be reduced. It is not so natural to provide for a reduction when he merely has a right to receive and in certain circumstances might never receive remuneration, for example if his new employer went bankrupt. We were quite rightly referred to the decision of the Court of Appeal in *Allen v Thorn Electrical Industries Ltd* (1) in which in quite a different connection 'paid' was held to mean 'payable', but I do not think that the reasoning behind that decision is applicable in the present case.

As regards long-term compensation, the tribunal altered its original assessment and in a way unfavourable to the appellant. Whereas originally it had only deducted two-thirds of £1,500, namely £1,000, as in the case of resettlement compensation, in the course of the further hearing, it made a deduction of £1,250. In doing so it stated:

'The [appellant] was 58 at the time of the termination of his employment with the Eston Urban District Council. He was a qualified solicitor, though he lacked experience in private practice, but as he said in evidence he had considerable experience in planning, housing and public health matters and local government enquiries. The tribunal were shown a list of vacant posts for which he had applied without success, some five of them before entering into the partnership agreement and the rest after that date. When the staff for the [respondents] were being appointed in December 1967 he had been given the opportunity of being a candidate (without having to make a formal application) for one or other of four posts. Two posts were as assistant town clerk in the salary grade £3,075-£3,435 and two posts as assistant solicitor in the salary grade of £2,085-£3,165. But he was unwilling to be a candidate for any of these posts. They were not formally offered to him and so this was not a relevant consideration under regulation 7 (1) (d) when assessing re-settlement compensation. It is, however, a factor to be considered under regulation 14 (1) (c) and (f) when assessing long term compensation.'

It is conceded that the reference to reg 7 (1) (d) was a mistake for reg 13 (1) (c) (ii) and that the tribunal was quite right in saying that that regulation had no relevance here. It did, however, consider that the matters cited were made relevant by reg 14 (1) (c) and (f) which provided that regard should be had to:

'(c) the extent to which he has sought suitable employment and the emoluments which he might have acquired by accepting other suitable employment offered to him. . . (f) all the other circumstances of his case.'

It is urged that the tribunal was wrong in so doing. (i) It is said that in considering suitable employment under para (c) or the circumstances under para (f), vacancies in any local authority employment (or at least in the same local authority employment) should be excluded. I can see no valid reason why this should be so. (ii) It is said that 'all the other circumstances of his case' only embrace matters arising after his loss of employment. Again I can see no reason why this should be so. (iii) It is said that the request to be a candidate, having been made some months before notice of dismissal, was too remote to be taken into consideration. Clearly, however, for some time prior to the notice of dismissal re-employment was under consideration. The appellant knew that he was likely to be dismissed and that the respondents wanted him to apply for employment with them. I cannot myself see why in these circumstances the tribunal should not take the request into consideration as indicating that he was at any rate something more than a £1,500 a year man.

(1) [1967] 2 All ER 1137; [1968] 1 QB 487.



Accordingly, I would dismiss the appeal in regard to long-term compensation and allow the appeal in respect of resettlement compensation and remit the case to the Industrial Tribunal with the opinion of this court to assess the weekly rate of compensation in default of agreement.

**ASHWORTH J.** I agree.

**BROWNE J.** I agree.

*Case remitted.*

Solicitors: J G Haley; Lewin Gregory, Mead & Sons, for E C Parr, Middlesbrough.

G.F.L.B.

### COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, CJ, ASHWORTH AND CANTLEY, JJ)

17th November 1970

R v IRONFIELD

*Criminal Law—Compensation—Payment by convicted person—Liability to make restitution—Forfeiture Act, 1871, s 4.*

By the Forfeiture Act, 1871, s 4, as amended by the Criminal Law Act, 1967, s 10 (1), sch 2, para 9, where a person has been convicted of an offence, e.g. burglary, the court before which he is tried, may, on the application of any person aggrieved, award any sum of money not exceeding £400 to be paid by the convicted person as compensation for the loss of property suffered by the person aggrieved through the commission of the offence.

An order can properly be made under this section even though the convicted person has no means and on his release from prison will want such money as he can earn to rehabilitate himself.

APPEAL by Barrie Ironfield against a sentence of concurrent terms of four years' imprisonment passed on him after he had pleaded guilty to three charges of burglary. He was also ordered, under s 4 of the Forfeiture Act, 1870, to pay to the licensee of an inn £140 compensation, which sum he had stolen in cash from the inn.

C L Kelly for the appellant.

**LORD PARKER CJ** giving judgment, said that the sentence would be reduced to three years' imprisonment on each charge concurrent, and continued: Leave to appeal was given in this case by the single judge in relation to the compensation order that was made, the single judge thinking, wrongly as it turns out, that £100 was the maximum that could be ordered to be paid. In fact, that figure of £100 has been increased to £400 by the Criminal Law Act 1967, s 10 (1), sch 2, para 9, and, accordingly, £140 was well within the jurisdiction of the court. Counsel for the appellant has argued in connection with this compensation order that it would be wrong in principle to allow it to stand in the case of a convicted person who has no means and who on his eventual release from prison will require such money as he can earn to rehabilitate himself, and that it would be wrong to make a compensation

order in a case of a convicted person subjected to a considerable period of imprisonment who has no means. He points by analogy to rulings of this court in that connection relating to fines or costs\*. This court is quite satisfied that a completely different principle applies in the case of compensation. If a man takes someone else's property or goods, he is liable in law to make restitution or pay compensation even if no compensation order is made by the court before which he is convicted. A victim who wishes to assert his rights need not be put to the additional trouble and expense of independent proceedings, and certainly cannot be required to forego his rights in order to facilitate the rehabilitation of the man who has despoiled him. In contrast, liability to pay a fine or costs can only arise from an order of the court, and, in the case of a fine, is entirely punitive. There is no reason to interfere with the compensation order.

*Sentence reduced.*

Solicitor: Registrar of Criminal Appeals.

G.F.L.B.

### HOUSE OF LORDS

(LORD HODSON, VISCOUNT DILHORNE, LORD WILBERFORCE, LORD PEARSON AND LORD DIPLOCK)

13th, 14th October, 25th November 1970

SINGETTE LTD AND OTHERS v MARTIN

*Gaming—Pool betting—Lottery—Competition for prizes for making forecasts as to sporting events—Need of skill in making forecasts—Betting, Gaming and Lotteries Act, 1964, s 41, Sched 2, para 13 (a).*

By para 13 (a) of Sched 2 to the Betting, Gaming and Lotteries Act, 1963, to be legal a pool betting business carried on by a registered pool promoter, 'shall take the form of the promotion of competitions for prizes for making forecasts as to sporting or other events, the bets being entries in the competitions and the winnings in respect of the bets being the prizes or shares in the prizes'.

By s 41 of the Act: 'Subject to the provisions of this Act all lotteries are unlawful'.

Competitors in a weekly football pool conducted by the appellants received a card showing four numbers between 1 and 55. Each week a number between 1 and 55 was appropriated to each of the home teams in a list of 55 association football matches. To enter the competition the competitor paid a small stake. His teams in the week's competition were determined by relating the numbers shown on his card to the numbers appropriated to the home teams in the week's fixture list. He could select his own numbers if he so desired, but in any given week some 99 per cent of the competitors retained the four numbers shown on their cards.

\* See, e.g., *R v Gaston* (Court of Appeal, Criminal Division, 16th Nov 1970) where the appellant was convicted at Birmingham Quarter Sessions of burglary and was sentenced to three years' imprisonment. An order was made under s 2 (1) of the Costs in Criminal Cases Act 1952, as substituted by s 32 (1) of the Criminal Justice Act 1967, that he pay the costs of the prosecution. No inquiries were made as to the appellant's means; at his trial he was legally aided with a nil contribution. On appeal it was held that it was inappropriate to order a convicted person to pay the costs of the prosecution when giving him a considerable prison sentence unless he had private capital; in the case then before the court any money the appellant had got on coming out of prison after serving his sentence would be vitally needed for his rehabilitation, and, therefore, the order for the payment of costs by the appellant would be set aside.

HELD: (i) the vast majority of the competitors merely accepted the numbers given on their cards, and so any prizes they won were the result, not of their exercising skill in forecasting the winners of the matches, but of their holding numbers which happened to be lucky in the particular week; accordingly, the competition was not 'for prizes for making forecasts as to sporting events' and did not comply with the requirements of para 13 (a).

(ii) for a competition to be a lottery the winning of a prize must depend solely on chance and not on skill; this competition, therefore, had the character of a lottery, and was illegal in view of the provisions of s 41.

APPEAL by Singette Ltd, ABC Pools Ltd, Marlo Carlo Carpanini, Brian Goode, James Lynch and Kenneth Henry Welsher, against a decision of a Queen's Bench Divisional Court reported [1970] 2 All ER 570, dismissing appeals against their convictions by the stipendiary magistrate for Cardiff on informations preferred against them by the respondent, Frederick Martin.

*Tasker Watkins QC and T M Evans for the appellants.*

*B F Griffiths QC and A M Jones for the respondent.*

Their Lordships took time for consideration.

25th November. The following opinions were delivered.

**LORD HODSON:** I have had the advantage of reading the opinion of my noble and learned friend, LORD PEARSON, with which I agree. I would dismiss the appeal.

**VISCOUNT DILHORNE:** I have had the advantage of reading the opinion of my noble and learned friend, LORD PEARSON. I agree with it and I would dismiss the appeal.

**LORD WILBERFORCE:** I have had the advantage of reading the opinion of my noble and learned friend, LORD PEARSON, with which I agree. I would dismiss the appeal.

**LORD PEARSON:** The appellants were convicted by the stipendiary magistrate for the city of Cardiff of offences against the Betting, Gaming and Lotteries Act 1963, in respect of weekly football pools, called 'competitions', conducted by them. The competitions were promoted by the appellants Singette Ltd, who were registered pool promoters. The appellants ABC Pools Ltd acted as administrative agents for Singette Ltd. The appellants Carpanini and Goode were directors of Singette Ltd, and the appellants Lynch and Welsher were directors of ABC Pools Ltd. The details of the numerous charges need not be set out. The correctness of the convictions under the first five charges depends on the correctness of the respondent's contention that the pool betting business involved did not conform with the requirement of para 13 (a) of Sch 2 to the Act that such a business

'shall take the form of the promotion of competitions for prizes for making forecasts as to sporting or other events, the bets being entries in the competitions and the winnings in respect of the bets being the prizes or shares in the prizes.'

If that contention is correct, it follows that offences were committed under s 4 (3) and paras 13 (a) and 29 (2) of Sch 2. The correctness of the convictions under the last 24 charges depends on the correctness of the respondent's contention that the pools were lotteries and unlawful under s 41 of the Act. If that contention is correct, it follows that offences were committed under s 42, as none of the exemptions provided by s 43 to 46 was applicable.

In setting out the facts I shall follow the Case Stated with some amplification from explanations given by counsel and illustrative documents—rules and forms—that have been supplied.

Membership of the Cancer League Club was a prerequisite to participation in the competitions conducted by the appellants. On joining the Cancer League Club a person received a membership card containing four numbers between 1 and 55. The stub of the card was returned to and kept by the club and served as a record of membership and of the member's numbers in the competitions. The member could accept the numbers tendered to him (the numbers being already printed on the card) or could select his own numbers if he so desired (filling in his numbers on blank spaces in the card). The majority accepted those tendered. A person entered for the competitions by paying in advance 1s to an authorised collector. This covered the weekly stake of 4d per week for three weeks. Of each 1s collected 2d was paid over for use in cancer research, education and treatment. Of the remaining 10d in the 1s a part (stated to be about 2d or 3d) was paid out in 'dividends' (ie prizes) in the competitions, part was used in providing gifts or prizes in certain lucky dip schemes (stated to be the subject of other proceedings), and the remainder went in commission, pool betting duty, other expenses, and reserves.

Each week a number between 1 and 55 was appropriated to each of the home teams in a list of 55 association football fixtures in the national leagues. A participant's teams in the week's football competition were determined by relating his membership card numbers to the numbers appropriated to the home teams in the list of football fixtures. A participant's initial set of four numbers remained in force subject to his right to submit a revised pools entry coupon substituting other numbers of his choice for any particular week. A revised pools entry coupon had to be sent to the appellants Singette Ltd in a sealed envelope and had to be posted by the entrant not later than the Thursday prior to the matches. It would not be accepted through the medium of a collector. Also, there was a form called 'postal forecast coupon', on which an additional entry with chosen numbers could be made for a particular week on payment of an additional sum of 4d. A person, before submitting a revised pools entry coupon or postal forecast coupon for a particular week, would be able to see the numbers appropriated to the home teams on the list of fixtures for that week and consequently he could make his own choice of his four teams for that week. In any given week, however, some 99 per cent of the participants remained passive and retained the identical four numbers that they had had in preceding weeks without making any selection whatsoever for themselves. Weekly football pool coupons did not have to be filled in by the participants.

Of the sums allocated as prizes for the competitions, 90 per cent was paid to the participant or participants whose four teams won their matches and scored the highest total number of goals, 5 per cent was paid for the highest total of goals from three winning home teams and a draw, and 2½ per cent was paid for the highest total of goals from four draws. Those prizes were called 'dividends'. There was also, as appears from the rules, 'Pontoon 2½ per cent. Highest total goals scored by four unbeaten home teams in six weekly competitions'. The learned magistrate stated his opinion and decision as follows:

'I was of opinion that, looking at the realities and at what in fact happened with regard to these competitions, that is to say that in any given week 99% of the participants retained the identical four numbers that they had had in the preceding weeks without taking action to make any forecast whatsoever for themselves, such competitions did not involve any real element of forecasting skill but were ones of pure chance. Accordingly, I entered convictions on the informations ...'

On appeal the Divisional Court of the Queen's Bench Division held that the decision of the learned magistrate was correct, and they dismissed the appeal, but they gave the appellants leave to appeal to your Lordships' House and certified that points of law of general public importance were involved in their decision, namely:

'(1) Must a competition for prizes conducted by a registered pool promoter for making forecasts as to sporting events contain an element of skill to be lawful under para 13 (a) of Sch 2 to the Betting, Gaming and Lotteries Act 1963?

'(2) If such a competition conducted by a registered pool promoter is otherwise lawful under para 13, is it an unlawful lottery under s 41 of the Act if it does not require the exercise of skill?'

In the present appeal counsel for the appellants put forward three contentions, namely, (i) that the competitions were lawful as pool betting under Part I of the Act, not failing to comply with the requirement set out in para 13 (a) of Sch 2; (ii) that the competitions, being lawful as pool betting under Part I of the Act, could not be unlawful lotteries under Part III; and (iii) that in any case there was in the competitions an element of skill which prevented them from being lotteries.

In relation to the appellants' first contention the relevant provisions of the Act are as follows. Section 4 provides:

'(2) No person shall carry on any pool betting business otherwise than on a track unless he is a registered pool promoter . . . (3) Schedule 2 to this Act shall have effect for the purposes of the registration of a person as, and the conduct of his pool betting business by, a registered pool promoter.'

Schedule 2, para 13, provides:

'Subject to paragraphs 14 to 19 of this schedule, the pool betting business carried on by any registered pool promoter shall comply with the following requirements—(a) it shall take the form of the promotion of competitions for prizes for making forecasts as to sporting or other events, the bets being entries in the competitions and the winnings in respect of the bets being the prizes or shares in the prizes; (b) each bet shall be an entry in a particular competition; . . . (d) in each competition, the prizes shall be equally available for all the bets, and accordingly the question which bets qualify for, or for shares in, the prize or prizes and, save so far as it depends on the amounts staked, the amounts of the respective shares in the prizes, shall be determined solely by the relative success of the forecasts embodied in the respective bets . . .'

Schedule 2, para 29 (2), provides:

'If any registered pool promoter fails to comply with any duty imposed upon him by this schedule or if any of the provisions of this schedule, except so far as they impose duties on the accountant or the registering authority, are contravened in the case of the business of any registered pool promoter, the registered pool promoter shall be guilty of an offence.'

There is also a provision in s 55 of the Act that the expression 'pool betting' has the same meaning as for the purposes of the Betting Duties Act 1963. The meaning of 'pool betting' is defined in s 3 of the Betting Duties Act 1963. It is unnecessary for the purposes of the present appeal to decide whether or not the participants in the competition were making 'bets' or engaging in 'pool betting'. It can be argued that for a member merely to stand by and wait and see whether the four numbers on his card might happen to correspond with the numbers allocated by the promoters in a particular week to the four football teams which in that week won their matches and scored the highest aggregate number of goals would not be sufficiently positive

or active conduct to constitute a 'bet' or 'pool betting'. On the other hand, it can be argued that a member who in a particular week merely stands by and waits to see what happens is passively making a 'bet' that his numbers will be the lucky numbers for that week. The question which of these opposing arguments should be preferred can, and in my view should, be left undecided in this appeal. It has to be considered in this appeal whether the competitions, on the assumption that they constitute 'pool betting', comply with the requirement of para 13 (a) or not. Does the pool betting business 'take the form of the promotion of competitions for prizes for making forecasts as to sporting or other events'?

In my view, which is in agreement with the views of the learned magistrate and the Divisional Court, the answer is in the negative. There is a long-established course of business and the appellants well know the actual character of the competitions which they are promoting. On the average in any week 99 per cent of the participants do not make any forecast. They already have their numbers which were allocated to them in the past when most of them took the numbers which happened to be tendered to them and the others chose their numbers having no knowledge as to which teams would in future weeks be allocated by the appellants to those numbers. The participants have bought their cards, paying 1s for three weeks, and presumably they have done so because thereby they support the good cause of cancer research and treatment and because they are given the chance of winning a prize if their numbers happen to be the lucky numbers in a particular week. They do not have to do anything more or think about the matter again. In particular they do not have to estimate which teams are going to win and score the most goals. On the average in any week 99 per cent of them do nothing. If their numbers happen to be the lucky numbers in that week, they win prizes; otherwise, they do not. The prizes are not for making forecasts but for holding numbers which happen to be lucky in a particular week.

That is the general and predominant character of the competitions. There are the exceptional participants, averaging 1 per cent, who for a particular week use the revised pools entry coupon for the purpose of substituting for the previously allocated numbers other numbers which they have chosen with knowledge of the teams denoted by those numbers for that week. There may also be some participants using the postal forecast coupon for making additional bets paying the additional 4d for each. These exceptional participants can and presumably do make forecasts; they can choose the teams which according to their expectations or hopes are likely to win the matches and score the most goals. But these exceptional participants, who can and presumably do make forecasts, are too few in comparison with the 99 per cent of normal, inactive participants to alter the general character of the competitions, which are predominantly not competitions for prizes for making forecasts but competitions for prizes for holding lucky numbers. As will be pointed out later in relation to the question whether the competitions are lotteries, what is offered in substance and reality is a mere lottery available to all the participants, although there is associated with it an option for any participant in a particular week to opt out of the lottery and make a forecast. Therefore these competitions do not comply with the requirement of para 13 (a) and they involve the commission of offences under para 29 (2).

In my view, there is an element of skill in the making of 'forecasts as to sporting or other events' such as are contemplated by para 13 (a). Of course a person who has no knowledge or experience in the relevant field of sporting or other events cannot use any skill in his forecasting, and even a person who has such knowledge or experience may choose not to make use of it on a particular occasion. But para 13 (a) evidently contemplates activities such as football pools, and football pools can be taken as an illustration. A person who has some knowledge of the football teams



concerned and of their records of previous results can and naturally will exercise some skill in forecasting which teams are likely to win and (if this also has to be forecast) which of them are likely to score the most goals. Obviously, if one knows that a particular team has a strong forward line and good supporting half backs and is playing against an inferior team with a weak defence, it is reasonable to expect the former team to win and have a good score of goals. There is some skill in making the forecast, even if the reasonable expectation may be frustrated.

This conclusion undermines the appellants' second contention, which is that the competitions being lawful pool betting under Part I of the Act cannot be unlawful lotteries under Part III. The competitions are not lawful pool betting under Part I, because they do not comply with the requirement of para 13 (a). If they did comply with that requirement, they would be competitions for prizes for making forecasts as to sporting or other events and so would have an element of skill and would for that reason not be lotteries. There is no conflict or discrepancy in this respect between Part I and Part III of the Act. A competition which, having no element of skill, is an unlawful lottery under Part III, cannot be lawful pool betting under Part I.

The third contention of the appellants is that in any case the competitions are not lotteries because they have an element of skill. The question which arises here is to a large extent answered by what has been said above. The decided cases show that (i) a lottery is a distribution of prizes by lot or chance; (ii) for a competition to be a lottery the winning of a prize must depend solely on chance and not on skill; and (iii) in deciding whether a competition is a lottery or not, a realistic view should be taken and regard should be had to the way in which the competition is actually conducted: *Taylor v Smetten* (1), *Hall v Cox* (2), *Willis v Young and Stembridge* (3), *Scott v Director of Public Prosecutions* (4), *Director of Public Prosecutions v Phillips* (5), *Moore v Elphick* (6), and *Director of Public Prosecutions v Bradfute and Associates Ltd* (7).

For the 99 per cent in any week, who make no forecast but win prizes if their numbers happen to be lucky numbers for that week, the competition has the character of a lottery. For them the distribution of the prizes depends entirely on chance and no element of skill is involved. Is the competition saved from being a lottery by the fact that the participants have in each week an option to substitute chosen numbers, involving a choice of teams, and on the average 1 per cent of them exercise the option in any week? In my opinion it is not saved from being a lottery by that fact. In substance and reality what is offered is a lottery available to all the participants, but there is associated with it an option to opt out of the lottery in a particular week and try to win a prize by making a forecast. This option is something collateral to the lottery and does not take away its character as a lottery. In my opinion the judgment in *Challis v Newman* (8), which is not reported but was cited and relied on by LORD HEWART CJ in *Barker v Mumby* (9) and by LORD PARKER CJ in the Divisional Court in the present case, reached a correct conclusion, the facts being somewhat similar to those in the present case.

Some argument in favour of the respondent's contentions has been based on the variety of the prizes in the competitions. Of the prize money 90 per cent was paid

(1) 48 JP 36; (1883) 11 QBD 207.

(2) [1899] 1 QB 198.

(3) 71 JP 6; [1907] 1 KB 448.

(4) 78 JP 267; [1914-15] All ER Rep 825; [1914] 2 KB 868.

(5) 98 JP 461; [1934] All ER Rep 414; [1935] 1 KB 391.

(6) 110 JP 66; [1945] 2 All ER 155.

(7) 131 JP 117; [1967] 1 All ER 112; [1967] 2 QB 291.

(8) 27th April, unreported.

(9) 103 JP 125; [1939] 1 All ER 611.

to the participant or participants whose four teams won their matches and scored the highest total number of goals, 5 per cent was paid for the highest total of goals from three winning teams and a draw, and  $2\frac{1}{2}$  per cent for the highest total of goals from four draws. It can be said that if a participant made a forecast he would naturally be trying for the 90 per cent for the four winning teams with the highest total of goals, and he could hardly be trying at the same time for the  $2\frac{1}{2}$  per cent for four draws with the highest total of goals; if the  $2\frac{1}{2}$  per cent prize came to him it would come by chance and not as a result of his forecast. But I do not think this point carries much weight. He might win the 5 per cent as the result of a good forecast narrowly missing the right solution, and the  $2\frac{1}{2}$  per cent would be a mere consolation prize for one or more of the losers. The existence of these minor prizes does not in itself preclude the making of a genuine forecast aimed at winning the 90 per cent. The existence of such minor prizes which could only be won by chance might have some effect as an additional factor tipping the scale in a doubtful case, but it is not material in the present case. I would dismiss the appeal.

**LORD DIPLOCK:** I have had the advantage of reading the opinion of my noble and learned friend, LORD PEARSON, with which I agree. I would dismiss the appeal.

*Appeal dismissed,*

Solicitors: Swebstone, Walsh & Son, for Gaskell, Rhys & Otto-Jones, Cardiff; Lewin Gregory, Mead & Sons, for R H C Rowlands, Cardiff.

G.F.L.B.

## PROBATE, DIVORCE AND ADMIRALTY DIVISION

(PAYNE J)

15th December 1970

GSELL v GSELL

*Husband and Wife—Maintenance of wife—High Court order registered in magistrates' court—Application for variation—Substantial expenditure of time—Remission to High Court—Maintenance Orders Act, 1958, s 4 (4).*

Where a maintenance order made by the High Court has been registered in a magistrates' court for enforcement and an application for variation by the husband necessitates the examination of affidavits and accounts occupying a substantial length of time the justices should consider declining to deal with the application and passing it back to the High Court for consideration under s 4 (4) of the Maintenance Orders Act, 1958.

**APPEAL** by the husband, Jean Paul Gsell, from an order of Highgate justices refusing his application for an order varying a maintenance order made by the High Court in favour of his wife, Kathleen Jessie Gsell, and registered in the magistrates' court, and further ordering that £100 should be remitted from the arrears under the wife's order and that he should be sentenced to six weeks' imprisonment, suspended so long as he complied with the maintenance order, and paid £2 a week in respect of the arrears.

**PAYNE J:** The facts of this case are not of any particular public interest, but the case has drawn attention to some provisions of the Maintenance Orders Act 1958 to which I should like to refer. If a maintenance order is made by the High Court and registered in a magistrates court for enforcement, the justices have power under s 4 of the 1958 Act to vary the High Court order.

In the present case, after the making of the order in the High Court and the registration of the order in petty sessions, the husband because of illness ceased to be employed at a substantial wage. After a period of some seven months illness the doctor certified that he was not fit to return to his salaried employment, and he therefore, started a business on his own account. In order to ascertain what were his means and what he could afford to pay the wife it has been necessary to consider the details relating to the business which he is now conducting, and for that purpose I have had to examine affidavits, a large number of exhibits, and a ledger which the husband has kept in connection with the business. He and the wife have given oral evidence and have been cross-examined, and the case has taken the better part of a day.

It seems clear to me that the justices could not in the ordinary course of events have the time to devote to a case like this, nor in most cases would they be likely to have access to all the documents which have been brought before me. In such a case there is much to be said for the justices declining to consider the application for variation and passing the order back to the High Court so that the variation can be considered there. Such a step would avoid such an appeal as is made in this case, and would in the long run save time and expense. It so happens that in the present case I have had the advantage of affidavits and of oral evidence, but in some cases an appeal like this might be presented only on the justices' notes and reasons. I am not in any sense criticising the justices in the present case because no application was made to them to remit the matter here, nor when they started on this matter could they appreciate how complicated it was going to become. But in a suitable case, as it seems to me, it would be wise to pass variation back to the High Court instead of dealing with it in the magistrates' court. The power so to do is in s 4 (4) of the Maintenance Orders Act 1958, which provides:

'If it appears to the court to which an application is made by virtue of sub-s (2) of this section for the variation of a rate of payments specified by a registered order that, by reason of the limitations imposed on the court's jurisdiction by the last foregoing subsection or for any other reason, it is appropriate to remit the application to the original court, the first-mentioned court shall so remit the application, and the original court shall thereupon deal with the application as if the order were not registered.'

Solicitors: *Austin, Ryder & Co; Breeze & Wyles.*

G.F.L.B.

**COURT OF APPEAL (CRIMINAL DIVISION)**

(EDMUND DAVIES AND CROSS, LJJ, AND SHAW J)

9th November 1970

R v MARRIOTT

*Criminal Law—Dangerous drug—Possession—Evidence—Minute quantity of drug found on analysis.*

In the appellant's house police found a penknife which the appellant admitted was his property, and on a blade of it, when it was tested in a forensic science laboratory, were found 0.03 grains of cannabis resin.

Held: in view of the minute quantity of resin found the conviction of the appellant of being found in possession of the drug could not be supported without proof by the prosecution that he had had reason to think that at least there was some foreign matter on the blade.

*Warner v Metropolitan Police Commissioner* (1968) (132 JP 378) distinguished.

APPEAL by Charles Percival Marriott against his conviction at Cardiff Quarter Sessions of being in possession of a dangerous drug.

H V Williams for the appellant.

A M Jones for the Crown.

EDMUND DAVIES LJ delivered this judgment of the court: On 2nd April 1970 at the quarter sessions of the capital city of Cardiff before the assistant recorder, Charles Percival Marriott was convicted of unlawful possession of cannabis and he was conditionally discharged. By leave of the single judge he now appeals against his conviction.

The facts may be shortly stated. On 22nd December 1969 members of the South Wales drug squad searched the appellant's house in Cardiff. From the fireplace of the middle ground-floor room a police constable recovered some typical reefer cigarette ends which later proved to be free of any drug. She gave evidence that the appellant told her that he rented out that room, but that the tenant had left. Detective Constable Allsop gave evidence that he searched the appellant's bedroom, and that in a drawer of the headboard of the bed he found a penknife. He asked the appellant if it was his property and the appellant acknowledged that that was so. The important evidence of the police constable then continued:

I said to [the appellant]: "The blade of this knife appears to have been heated.

That would be consistent with it having been used to cut cannabis". I cautioned him. He shrugged and said nothing.'

That appears to be the only evidence of what was said in relation to the appearance of the blade of that knife, namely, that it looked as though it had been heated. No suggestion was then made that there was any foreign matter detectable on the blade.

That knife was later sent to a forensic science laboratory. Tests disclosed that adhering to the broken blade were 0.03 grains of cannabis resin. When the appellant was told of the result of the analysis, he said:

I don't believe it. If you'd said there was stuff on the reefer ends, I wouldn't have said anything about it, but you amaze me when you say there was stuff on the knife. The point's broken off. There couldn't be any left on there. They [I suppose that means the police] must have put it there themselves.'

That was the case for the Crown regarding the minute quantity of cannabis found on the knife-blade.

The appellant gave evidence that for about five years the ground-floor room had been used by a friend and then by the appellant's mother who stayed there for a while, and also by various other friends from time to time. He disputed that the knife was his property. He claimed that his wife had given him the knife, which he had not seen before. He thought it might belong to a Mr Shakespeare who had on occasion stayed in the middle room. He had opened the knife, but had never examined it and had put it in the drawer. His wife gave evidence that she had found the knife in a drawer in the middle room on the ground-floor three weeks or so before the police search. She did not know who the owner was. She gave it to her husband and he put it in the drawer, saying: 'If anybody asks for it, it is there for them'.

In a direction to the jury, which, in the view of this court, is unfortunately open to one important criticism, the learned assistant recorder clearly reminded them that the evidence had been that, while the charge related to the unlawful possession of 0.03 grains of cannabis resin, the normal quantity of that drug used for a single reefer cigarette varies between 10 and 15 grains, so that they were trying a case relating to the alleged possession of cannabis resin equivalent to about one-thirtieth of a single cannabis cigarette containing the lesser amount of about 10 grains. He directed the jury, as was proper in view of the decisions of this court, that the prosecution had to establish possession of an identifiable quantity of resin.

Then came the vital question relating to the appellant's possession. It needs to be stressed that he was not charged with the possession of a penknife. He was charged with the unlawful possession of cannabis. The learned assistant recorder said there was nothing to contradict the allegation that the cannabis resin 'emanated' from the blade of the penknife. Then he continued:

'I direct you in these terms: the possession of the penknife means the actual custody of the penknife at the material time.'

He went on to say that the defence had urged that the Crown had to establish that the appellant must know of the presence of the cannabis resin on the knife at the time when it was in his bedside drawer. He commented:

'Members of the jury, that is not the law. The prosecution do not have to establish knowledge on the part of the accused person, otherwise, you may think, a coach and horses could be driven through the purpose of the Dangerous Drugs Act [1965]. Let us take an example. Imagine a man is charged with possessing a dangerous drug, and the prosecution's case is that there is found in his home a pound of that dangerous drug among other materials in a cupboard, the accused man would be able to say: "I did not know it was a dangerous drug and, therefore, I am not guilty". What the law says is this, that a person shall not be in possession of a drug unless he is licensed or authorised to be in possession of it. It is a mandatory section.'

Now, was that satisfactory? This court is unanimous in reading those words as amounting to a direction that, if the jury were satisfied that at the material time the appellant was knowingly in possession of a penknife, then (a) if, even unbeknown to the appellant, there was on that penknife foreign matter; and (b) if, even unbeknown to the appellant, cannabis resin was contained in that undetected foreign matter, he had no defence to the charge of being in unlawful possession of 0.03 grains of cannabis.

The learned assistant recorder doubtless had the decision of the House of Lords in *Warner v Metropolitan Police Comr* (1) in mind. But that was a case significantly

different in its facts from the present case. There the police found in the appellant's van two cases, one containing scent and the other prohibited drugs. The accused's defence was that he had gone to a café, expecting to collect one case of a sort of scent in which he dealt as a side-line, which was to be left there for him by a man, and that he assumed that both the cases which he found had been left for him contained nothing but scent. The judge directed the jury that if the accused had control of the case which, in fact, turned out to be full of drugs, an offence was committed, and the fact that he did not know what the contents were would be relevant only in mitigation. He was convicted and his conviction was affirmed by the Court of Appeal. The matter then went to the House of Lords who dismissed the appeal.

Not all members of the House of Lords expressed themselves in precisely the same way, but for the purposes of this present appeal the result of *Warner's* case may broadly speaking and (we hope) with accuracy be stated in this way. If a man is in possession, for example, of a box and he knows that there are articles of *some* sort inside it and it turns out that the contents comprise, for example, cannabis resin, it does not lie in his mouth to say: 'I did not know the contents included resin'. On the contrary, on those facts he must be regarded as in possession of it, and, if not lawfully entitled, would, therefore, be guilty of an offence such as that charged in the present case. But what about a man who is undoubtedly in possession of a penknife which, as far as he knows, has no foreign matter on it at all, but, on the minute analysis to which it is subjected in the forensic laboratory, it then emerges (a) that there is foreign matter adhering to the blade and (b) that that minute foreign matter is, in fact, cannabis resin? Does it follow as night follows day that such a man must necessarily be guilty of the grave offence of being in unlawful possession of the minute quantity of cannabis resin, or is it incumbent on the prosecution to establish that he had reason to think that at least there was *some* foreign matter on the blade or on other parts of the knife?

It might be urged that, if knowledge of the existence of some foreign matter is established, the decision in *Warner's* case must lead to the conclusion that thereafter it would be no defence to say: 'Although I could see just a speck of stuff sticking to the blade, I did not know the speck was cannabis'. Perhaps the law does go as far as that. But must not the jury at least be directed that the Crown has to establish that the accused person had reason to know that there was foreign matter on the knife? We think that nothing said in *Warner's* case negatives the necessity for some such direction, and none was here given. It does not seem to us to be the law that proof of the mere possession of the penknife, without more, was enough.

Counsel for the Crown, who as always has assisted the court greatly by his submissions, has rightly reminded us of some very suspicious features of this case. They might lead one to the conclusion that in the house occupied (although not wholly and exclusively) by the appellant, the smoking of reefer cigarettes went on from time to time. There was a mark of heating on the knife-blade which led Detective Constable Allsop to say to the accused that it had been used for heating, and it would be open to the jury, insofar as it was material, to come to the conclusion on the whole of the evidence that possibly that very knife had in the recent past been used to cut up cannabis resin. But that was not the charge. The charge was that at the time that the appellant was picked up by the police he was in possession of 0.03 grains of resin. We do not think, in the absence of what we regard as the proper direction in the circumstances of the case, that this conviction ought to stand. We, accordingly, allow the appeal.

*Conviction quashed.*

Solicitors: Crowley, Grossman & Hermer, Cardiff; R H C Rowlands, Cardiff.

G.F.L.B.



COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, WIDGERY AND MEGAW, LJJ)

23rd, 24th November 1970

WILSON AND ANOTHER v LIVERPOOL CITY COUNCIL

*Town and Country Planning—Compulsory purchase—Compensation—Reference to Lands Tribunal—Agreement between parties as to basis of assessment—Subsequent decision of House of Lords that that basis wrong—Power of court to remit case to tribunal—Discretion.*

The L council sought to acquire compulsorily land belonging to the claimants. Notice to treat was given on 20th May 1965, and the council entered into possession on 26th July 1966. A dispute having arisen as to the amount of the compensation payable to the claimants the matter was referred to the Lands Tribunal. Before the tribunal both parties proceeded on the basis that the value of the land should be assessed as at the date of the notice to treat, and in July 1969 the tribunal determined the amount of compensation on that basis. Five days later the House of Lords gave its decision in *West Midland Baptist (Trust) Association v Birmingham City Corporation* (133 JP 524) by which they held that compensation in such a case was to be assessed, not by reference to the value prevailing at the date of the notice to treat, but by reference to that prevailing, *inter alia*, when possession of the land was taken. The value of the claimants' land having increased between May 1965 and June 1966, they appealed against the decision of the tribunal.

**HELD:** while it was within the jurisdiction of the court to send the case back to the tribunal for re-assessment of the compensation in accordance with the House of Lords decision, that was a matter of discretion, and in the circumstances of the present case the court would not allow the valuation to be re-opened.

*Town and Country Planning—Compulsory purchase—Compensation—Assessment—Application of Pointe Gourde principle to cases under Land Compensation Act, 1961, s 6 (1), Sched 1, part 1.*

In assessing compensation payable to landowners on a compulsory purchase of their land the Lands Tribunal applied the principle laid down in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* ([1947] AC 565), namely, that a deduction should be made on account of any increase in the value of the land which was due to the scheme underlying the acquisition. On appeal by the landowners,

**HELD:** the provision in s 6 (1) of the Land Compensation Act, 1961, that in assessing compensation no account was to be taken in specified cases of any increase or diminution in the value of the acquired property did not exhaustively define the increases which were not to be taken into account; therefore, other increases, including any under the *Pointe Gourde* principle, could be taken into account in cases under the Act, and the principle had been rightly applied by the tribunal in the present case.

CASE STATED by Lands Tribunal.

T H Pigot QC, J Turner and W George for the claimants.

D B McNeill QC and F Reynold for the council.

**LORD DENNING MR:** In this case Liverpool City Council ('the council') have used their compulsory powers to acquire 74 acres of land for housing purposes. The Lands Tribunal assessed its value as at the date of the notice to treat, 20th May 1965. They valued it at £343,500. The claimants, the landowners, appeal. They say that the land should have been valued as at the date when the council entered on the land, i.e., 26th June 1966. During the intervening 13 months there had been a very rapid increase of land values, especially in this part of Liverpool. The value at the later date, it is said, would be over £400,000. The council take a preliminary objection. It says that before the Lands Tribunal the parties conducted the inquiry

on the basis that the proper date was the date of the notice to treat, 20th May 1965, and that the claimants should not now be allowed to turn round and say that it should have been the date of entry, 26th June 1966.

On this point it is necessary to keep in mind the changing law. In 1867 in *Penny v Penny* (1) SIR WILLIAM PAGE-WOOD VC said: '... every man's interest shall be valued, rebus sic stantibus, just as it occurs at the very moment when the notice to treat was given.' That was accepted as correct for the next 100 years. The valuation was always made as at the date of the notice to treat. Just 100 years later in 1967 the Court of Appeal threw great doubt on that proposition. In *West Midland Baptist (Trust) Association (Incorporated) v Birmingham City Corp'n* (2) SALMON LJ said:

'I have grave doubts whether the open market prices prevailing at the date of the service of the notice to treat form the correct basis for assessing compensation.'

SACHS LJ agreed with that view. SELLERS LJ thought that it was not open to the Court of Appeal to change the law, but 'the House of Lords may have greater freedom'. Those doubts were expressed on 27th October 1967.

On 31st May 1968, the council referred this present case to the Lands Tribunal for it to fix the value to be placed on the land. The advisers on each side proceeded on the footing that the value was to be assessed as at the date of the notice to treat. They paid no regard to the doubts expressed in the Court of Appeal. The valuers submitted their figures as at the date of the notice to treat. In April 1969, the case was heard by the Lands Tribunal. It took 12 days between 21st April 1969 and 6th May 1969. It was conducted on the basis that the date of the valuation was the date of the notice to treat. On the 12th day (the last day) in the final reply on behalf of the claimants counsel said that he wanted to keep open the point whether the date of the notice to treat was the proper date. Otherwise nothing was said about it. The tribunal reserved its decision. Soon afterwards, while the tribunal was still considering its decision, the House of Lords, between 12th and 21st May 1969, heard the argument in the appeal in the *West Midland Baptist (Trust)* case (2). The House reserved its decision. Before the House gave its decision the Lands Tribunal, on 11th July 1969, gave its award in the present case. It said:

'It is common ground between the parties (for the purpose of this hearing at any rate) that the valuation should be made as at the date of the accepted notice to treat, namely 20th May 1965.'

It awarded £343,500.

Five days later, on 18th July 1969, the House of Lords gave its decision. It was published in the Times newspaper on the next day and has now been reported (2). The House said that the practice which had prevailed for over 100 years was wrong. Although r (2) of s 5 of the Land Compensation Act 1961 did not come up directly for decision, the House expressed its opinion on it. LORD REID said:

'Sometimes possession is taken before compensation is assessed. Then it would seem logical to fix the market value of the land as at that date... the present practice with regard to r. (2) is wrong...'

LORD MORRIS OF BORTH-Y-GEST said:

'The date by reference to which the value of the land should be assessed

(1) (1868), LR 5 Eq 227.

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under r. (2) is the date when the value is being agreed or is being assessed by the appropriate tribunal or, if it is earlier, the date when possession was taken.'

In consequence of those observations, it was plain that in the present case the valuation ought, in point of law, to have been taken as at the date of entry into possession, i.e. 26th June 1966, and not at the date of the notice to treat. When the claimants appreciated this they gave notice of appeal. The tribunal stated a Case in which it set out the position:

'At the hearing the valuations relied on by both parties purported to quantify the compensation as at the date of the notice to treat. The claimants' case was opened and presented on the basis that compensation was to be quantified as at the date of the notice to treat and no alternative valuations were submitted: there was therefore no issue between the parties as to what was the right date to take for valuation purposes, and our decision proceeded on the same basis, that is to say, we assessed compensation as at the date of the notice to treat . . . At the date of our hearing the appeal in the case of *Birmingham City Corp'n v West Midland Baptist (Trust) Association (Incorporated)* (1) had not been heard in the House of Lords. It was known, however, that this appeal was to be heard shortly and counsel for the claimants told us in his closing address that because of this he wished to reserve the question of what was the right date to take for the assessment of compensation. We have been asked by the claimants to record this matter and accordingly do so.'

On this appeal counsel for the claimants asks that the case should be sent back to the Lands Tribunal so that the valuation can be taken as at the proper date, 26th June 1966. He cites *Lissenden v C A V Bosch Ltd* (2) where a man who had not got enough compensation under the Workmen's Compensation Act 1925 was allowed to appeal on the ground that compensation should have been larger. It is, of course, within the jurisdiction of this court to remedy errors made in point of law by a tribunal of first instance. It has sometimes happened that the law has been changed by a subsequent decision of this court or of the House of Lords, and this court has extended the time for appeal so as to allow the previous decision to be corrected: see *Re Berkeley, Borrer v Berkeley* (3). But it is a matter for the discretion of the court. In this case I do not think that we should allow this valuation to be reopened. The advisers of the claimants must have known of the *West Midland Baptist (Trust)* case (1). They must have seen the judgments given in this court in October 1967 long before the Lands Tribunal entered on this reference. Anyone reading that case could have seen that there was a big question mark about the date of the notice to treat. If the advisers of the claimants had desired to keep that as a live point, they should have asked the valuers to have made alternative valuations and to have put them before the tribunal. The tribunal would then have given an award in an alternative form such as is contemplated by the Lands Tribunal Rules 1963, r 49 (5), and was done in the *West Midland Baptist (Trust)* case. Instead of asking for an alternative award, the claimants went before the tribunal asking for one valuation on a single date, the date of the notice to treat. They conducted a long, detailed hearing for 12 days at great expense on that basis. They cannot be allowed now to reopen the matter, and ask for a valuation at another date. I think that the preliminary objection should be upheld and the appeal on this point should not be allowed.

(1) [1968] 1 All ER 205; [1968] 2 QB 188; *aff'd* HL 133 JP 524; [1969] 3 All ER 172; [1970] AC 874.

(2) [1940] AC 412.

(3) [1945] 1 All ER 83; [1945] Ch 107; *rvsd* HL sub nom *Countess of Berkeley v Berkeley* [1946] 2 All ER 154; [1946] AC 556.

**WIDGERY LJ:** I agree. The claimants contend that the tribunal committed an error of law in making its assessment by reference to valuations relating to the date of the notice to treat rather than to the date of the notice of entry. This point was not taken before the tribunal; indeed, on the contrary, the claimants in conjunction with the council were at some pains to agree that the date of the notice to treat was the proper date. If we were now to allow the appeal to proceed on this basis, it would inevitably mean that the matter would have to be sent back to the tribunal for further findings of fact. Counsel differed in their observations as to how lengthy and expensive that further hearing might be, but that there would have to be a further hearing is beyond doubt. It seems to me therefore that this case is within the well known rule of practice that, if a point is not taken in the court of trial, it cannot be taken in the appeal court unless that court is in possession of all the material necessary to enable it to dispose of the matter finally, without injustice to the other party, and without recourse to a further hearing below.

In appeals by way of Case Stated, such as this, I would have thought that that principle was of particular importance. I recognise, as does LORD DENNING MR, that, being a rule of practice, this rule contains an element of discretion. There may well be cases in which justice demands that a different view be taken owing to the special circumstances of the case, but this, in my judgment, is clearly a case in which no sort of exception should be made. The claimants had the benefit of the best expert advice. They had, as LORD DENNING MR has pointed out, ample time to consider the judgment of the Court of Appeal in *West Midland Baptist (Trust) Association (Incorporated) v Birmingham City Corpn* before the reference was even undertaken, and they determined to go ahead and fight this matter on the basis of the understanding of the law which we had had for 100 years prior to that time. I see no reason whatever why an exception should be made in their case under the court's discretion, and I too would rule that this part of the appeal cannot go forward.

**MEGAW LJ:** I agree with the view expressed by LORD DENNING MR and WIDGERY LJ that this is a matter for discretion in this court whether or not the claimants ought to be allowed to argue in this court a point of law which was not argued in the Lands Tribunal. I agree also, for the reasons given by LORD DENNING MR and WIDGERY LJ, that in this case the discretion ought not to be exercised in favour of the claimants in the circumstances which here prevail.

Further argument having been heard,

**LORD DENNING MR.** The claimants have a second ground of appeal. They say that the Lands Tribunal, in making its valuation, applied the *Pointe Gourde* principle when it ought not to have done so. To appreciate this point I must summarise the history of this acquisition. In 1960 the council was very much pressed to provide housing accommodation. It could only find one area suitable for housing development. It was some 391 acres between two golf courses. It was in private ownership. The council managed to buy some 305 acres of it by agreement. But there was quite a large area which it was unable to acquire by agreement. It took steps to obtain compulsory powers over it. I will not go into details, but I may say that on 14th November 1963 the Minister of Housing and Local Government himself granted the council permission to develop the whole of the land. On 28th February 1964, the council made a compulsory purchase order for the remaining portion which it wanted to acquire. There was a public inquiry. The inspector made recommendations suggesting that some should be left for private development, but those were overruled by the Minister. On 27th January 1965, the Minister confirmed



the compulsory purchase order without modification. He felt that the council's urgent housing needs and its slum-clearance problems should take precedence over other considerations. We are only concerned with 74 acres belonging to one owner. On 2nd May 1965, the council gave notice to treat. The Lands Tribunal assessed the value of the land as at that date. In making its calculations, it made a deduction on account of an increase in value which was due to the scheme underlying the acquisition. The tribunal applied the principle which was stated by LORD MACDERMOTT in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* (1):

'It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.'

The principle goes back to *Fraser v City of Fraserville* (2) in which the Privy Council said:

'the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired'

The question has arisen whether that principle applies to cases under the Land Compensation Act 1961. That Act contains an elaborate provision about prospective development. It sets out in a schedule the circumstances in which no account is to be taken of any increase in value due to the prospect of development: see s 6 (1) and Part I of sch 1. It is suggested that that provision contains a code which defines exhaustively the increases which are *not* to be taken into account, so that any other increase is to be taken into account, and, accordingly, there is here no room for the *Pointe Gourde* principle. This court has rejected that argument. In *Viscount Camrose v Basingstoke Corpn* (3) we held that the *Pointe Gourde* principle still applies to development which is not mentioned in sch 1 to the 1961 Act. Counsel for the claimants recognises that that decision is binding on this court but he may desire to challenge it in the House of Lords. Accepting the decision, however, he says that the *Pointe Gourde* principle does not apply here. The principle only applies, he says, when the scheme is precise and definite, and is made known to all the world. He referred us to the cases in Chancery on building schemes, such as *Elliston v Reacher* (4) and *Reid v Bickerstaffe* (5).

I do not accept counsel's submission. A scheme is a progressive thing. It starts vague and known to few. It becomes more precise and better known as time goes on. Eventually it becomes precise and definite, and known to all. Correspondingly, its impact has a progressive effect on values. At first it has little effect because it is so vague and uncertain. As it becomes more precise and better known, so its impact increases until it has an important effect. It is this increase, whether big or small, which is to be disregarded as at the time when the value is to be assessed.

The tribunal gave an excellent reasoned decision. I find no fault in it. It said:

'We have no doubt that the "scheme" was the [council's] proposal to develop the whole of the [391 acres] for residential and ancillary purposes... We think

(1) [1947] AC 565.

(2) [1917] AC 187.

(3) 130 JP 368; [1966] 3 All ER 161.

(4) [1908] 2 Ch 374; *aff'd* CA [1908-10] All ER Rep 612; [1908] 2 Ch 665.

(5) [1908-10] All ER Rep 298; [1909] 2 Ch 305.

a prospective purchaser of the subject land would have known well enough by November 1963 what the scheme was when the Minister granted outline planning permission; or at the very latest by the end of January 1965, when the compulsory purchase order was confirmed.'

The tribunal stated that it was satisfied that by the date of the notice to treat a purchaser would have known enough about the scheme to have been able to allow for its effect in deciding what price he would pay for the subject land.

Applying the *Pointe Gourde* principle, the tribunal made its valuation in this way. It took some comparable land, next to these 74 acres, which had been sold in 1965 for £6,700 an acre by a private owner to a private developer. That was the dead ripe value. That value was an enhanced value because seller and purchaser knew of the scheme and knew that the council would install sewage works and so forth of which the developer could take advantage, and it was two years in advance of the land the subject of this inquiry. Making all allowances, and deducting the increase owing to the scheme, it arrived at a value of £343,500. I think that the tribunal was quite right to deduct the increase owing to the scheme. I would dismiss this appeal accordingly.

**WIDGERY LJ:** I agree. Whenever land is to be compulsorily acquired, this must be in consequence of some scheme or undertaking or project. Unless there is some scheme or undertaking or project compulsory powers of acquisition will not arise at all, and it would, I think, be a great mistake if we tended to focus our attention on the word 'scheme' as though it had some magic of its own. It is merely synonymous with the other words to which I have referred, and the purpose of the so-called *Pointe Gourde* rule is to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition.

The extent of the scheme is a matter of fact in every case, as is shown by the decision of *Fraser v City of Fraserville* (1), to which LORD DENNING MR has referred. It is for the tribunal of fact to consider just what activities—past, present or future—are properly to be regarded as the scheme within the meaning of this proposition. The scheme will always exist in some shape or form by the time the notice to treat is served. It must, indeed, be in some shape or form at the confirmation of the compulsory purchase order itself, and then, as LORD DENNING says, it may develop almost from day to day, and the ultimate question for the valuer is to decide to what extent the dead ripe value of the land on the day on which the valuation is to be made has been increased by reason of the existence of the scheme. We were invited by junior counsel for the claimant to lay down rules and regulations governing the assessment of this element, but this, in my judgment, would be entirely wrong. It is essentially the duty of the valuer, using his skill, to decide what part of the open market dead ripe value of land is fairly to be regarded as having been contributed by the scheme. It is entirely a matter for the valuer, not a question for this court at all, and I too would dismiss this appeal.

**MEGAW LJ:** I agree.

*Appeal dismissed.*

Solicitors: Gregory, Rowcliffe & Co, for Benjamin, Kay & Berman, Liverpool; Stanley Holmes, Town Clerk, Liverpool.

G.F.L.B.

(1) [1917] AC 187.

NOTTINGHAM ASSIZES

(KILNER BROWN J)

3rd October 1970

R v STEVENSON AND OTHERS

*Criminal Law—Evidence—Electronic tape recording—Proof by prosecution of originality.*

Where in a criminal case the prosecution tender as evidence electronic tape recordings and the defence contend that such recordings have been fabricated and are not the original recordings, before the recordings can be admitted as evidence the prosecution must prove beyond reasonable doubt that they are the original, unaltered, recordings.

TRIAL on indictment.

At the trial of the defendants, Ronald Stevenson, Barry Hulse and Raymond Whitney, being police officers who had been indicted at Nottingham Assizes on charges of conspiring to pervert the course of justice, the prosecution sought to tender in evidence electronic tape recordings alleged to be of conversations between the defendants and a witness for the prosecution. The defendants objected to the admissibility of these recordings, and His LORDSHIP heard argument on the question.

Kenneth Mynett QC and J P Harris for Stevenson.

P J Cox QC and B J Appleby for Hulse.

D M Cowley QC and K Matthewman for Whitney.

**KILNER BROWN J:** Counsel for all three defendants have submitted that evidence tendered by the prosecution is inadmissible or is so tainted that it should be excluded. This evidence consists of electronic tape recordings of human voices alleged to be conversations between the defendants and one of the witnesses for the prosecution. It is said that the recordings have been fabricated and are not originals.

In considering this matter I have endeavoured to apply certain principles established by authority. The clearest and most authoritative statement of these principles is to be found in the reasons of the Board given by LORD GODDARD CJ in *Kuruma Son of Kaniu v R* (1). As a general rule any material which is relevant and of probative value is admissible. It matters not how it is obtained. To the general rule that all relevant matter is admissible there are two exceptions. The first exception, which historically stems from the former prohibition on an accused person from giving evidence on his own behalf, is that oral or written statements which incriminate the accused and are made by him must be voluntary and are inadmissible if obtained by intimidation or inducement. The second exception, which involves a pragmatic test founded on natural justice, is that a judge has a discretion to exclude matter the prejudicial effect of which exceeds its probative value. In *Kuruma's* case (1), LORD GODDARD put in more widely when he said:

'in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.'

In saying that he was basing his observation on the authority of the two cases, *Noor Mohamed v R* (2) and *Harris v Director of Public Prosecutions* (3), and in particular the passage in LORD DU PARCQ's speech in the former case which was approved by VISCOUNT SIMON in the latter case.

(1) 119 JP 157; [1955] 1 All ER 236; [1955] AC 197.

(2) [1949] 1 All ER 365; [1949] AC 182.

(3) 116 JP 248; [1952] 1 All ER 1044; [1952] AC 694.

In my view, however, it is of vital importance not to take those passages out of context. Their Lordships were dealing with instances of exclusion of true facts such as previous convictions or other similar offences. Plainly, in such instances, the probative value may be small and the prejudice enormous. I do not understand those cases as any authority for saying that judicial discretion may be canvassed over a wide area. Similar principles were applied in *R v Harz*, *R v Power* (1). Confessions obtained by threats were inadmissible, but documents and material, however improperly obtained, were admissible. One further general proposition which must not be overlooked is that although it is for the judge to rule on admissibility, it is for the jury to decide on the truth or falsity of any piece of evidence.

*R v Maqsood Ali*, *R v Ashiq Hussain* (2) is in point on the question of tape-recorded evidence. Certain passages in the judgment of the court clearly indicate that, when dealing with this type of evidence, particular care is required, and contemplate that issues of truth or falsity may in some instances have to be considered as matters of admissibility. Moreover, in the most recent case of *R v Senat* (3), while approving the admission of tape recorded evidence, LORD PARKER CJ would appear to have kept open the issue where recordings may have been tampered with or may have been wrongly transcribed. Consequently in this case an extremely lengthy and detailed examination of the evidence has taken place on the voir dire. This examination has been conducted with very great care. It has been highly technical and very scientific at times and extremely burdensome for everybody engaged in this case. I interpolate to say that I have been greatly assisted by the way in which this examination has taken place, greatly assisted by those who had the technical duty of producing it, by those who have given evidence and by counsel who have probed that evidence before me. Nevertheless, as a general rule, it seems to me to be highly undesirable, and indeed wrong for such an investigation to take place before the judge. If it is regarded as a general practice it would lead to the ludicrous situation that in every case where an accused person said that the prosecution evidence is fabricated the judge would be called on to usurp the functions of the jury.

Notwithstanding the wide area over which this inquiry has ranged I intend to limit my approach to one single issue which in my view is legitimately within the province of admissibility. It may be alternatively, if I am wrong in that, a question of discretion. I decide this matter on the narrow but vital question whether or not the so-called original tapes are established as original. Just as in the case of photographs in a criminal trial the original unretouched negatives have to be retained in strict custody so in my view should original tape recordings. However one looks at it, whether, as counsel for the Crown argues, all the prosecution have to do on this issue is to establish a prima facie case, or whether, as counsel for the defendant Stevenson in particular, and counsel for the defendant Hulse joining with him, argues for the defence, the burden of establishing an original document in a criminal case is a burden of proof beyond reasonable doubt, and in the circumstances of this case it seems to me that the prosecution have failed to establish this particular type of evidence. Once the original is impugned and sufficient details as to certain peculiarities in the proffered evidence have been examined in court, and once the situation is reached that it is likely that the proffered evidence is not the original—is not the primary and best evidence—that seems to me to create a situation in which, whether on reasonable doubt or whether on a prima facie basis, the judge is left with no alternative but to reject the evidence. In this case on the facts as I have heard them such doubt does arise. That means that no one can hear this evidence and it is inadmissible.

(1) [1966] 3 All ER 433; [1967] 1 AC 760; *affid* HL sub nom *Comrs of Customs and Excise v Harz* 131 JP 146; [1967] 1 All ER 177; [1967] 1 AC 800.

(2) [1965] 2 All ER 464; [1966] 1 QB 688.

(3) (1968), 52 Cr App Rep 282.

Mr Simon Regan admitted that he was not as careful with the original tape recordings as he might have been and I accept his explanation that when he had them their use in a court of law was not envisaged. This is not to be taken as a suggestion that he interfered with them, nor that anyone else did with his knowledge, nor is this any suggestion that Mr Faraday or Star Sound Studios did so. It is, however, quite plain to me that there was opportunity for someone to have interfered with the original, and, putting it at its lowest, there is clear evidence before me that some interference may have taken place.

The only reason I have dealt with this question at length is so that steps may be taken in future to ensure that tape recorded evidence is treated with care and circumspection by those who obtain it in the first place. I wish to make it clear that such criticisms are not levelled at those who have conducted this prosecution with scrupulous fairness and complete integrity. However, for the reasons which I have given, I shall exclude this evidence.

Solicitors: *Rotheras, Nottingham; Director of Public Prosecutions.*

G.F.L.B.

### QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, ASHWORTH AND BROWNE, JJ)

26th, 27th October 1970

WHEATLEY v LODGE

*Arrest—Defendant deaf and unable to lip-read—Unaware that he was being arrested.*

The arrest of a totally deaf person who cannot lip-read, or a person who cannot speak English, by a constable without a warrant is valid if the arresting constable has done everything which a reasonable person would have done in the circumstances even though the arrested person was unaware that he was being arrested.

CASE STATED by justices for the county borough of Darlington.

On 21st January 1970, an information was preferred by the appellant, George Wheatley, against the respondent, Maurice Lodge, charging that at Darlington on 29th November 1969 he drove a motor car on a road called Russell Street having consumed alcohol in such a quantity that the proportion thereof in his blood as ascertained from a laboratory test for which he subsequently provided a specimen under s 3 of the Road Safety Act 1967 exceeded the prescribed limit at the time he provided the specimen in that it contained 215 milligrammes of alcohol in 100 millilitres of blood, contrary to s 1 (1) of the 1967 Act.

On the hearing of the information at Darlington Magistrates' Court on 27th February 1970, the following facts were found. The respondent was totally deaf and unable to lip-read. At about 11.40 pm on 29th November 1969, he was driving a Morris car when it was involved in a collision with a Ford Zodiac car parked outside 8 Upper Russell Street. The appellant (a police constable) arrived at the scene of the accident in Upper Russell Street at midnight. The appellant went to 57 Borough Road where he knocked on the door. The respondent did not hear the knock, but after a short interval came out of the house and found the appellant there. He had come out with the intention of returning to the scene of the accident. The appellant noticed the respondent's breath smelt of drink and he was unsteady on his feet. The appellant asked him if he had been driving the Morris 1100 motor car which had been involved in the accident in Upper Russell Street and the respondent,

thinking that he was being asked to return to the scene of the accident said: 'Yes', turned, and began to walk in that direction. The appellant gave the usual caution and told the respondent that he was being arrested for driving a motor vehicle while under the influence of drink. The respondent saw that the appellant was speaking and said: 'Yes, definitely, definitely'. In response to a gesture from the appellant he entered a police car and was conveyed to Darlington police station. When he got into the police car he did not know that the appellant had purported to arrest him, but thought that he was being invited to enter the car to give his account to the police of how the accident had happened. At no time did the respondent indicate to the appellant that he was deaf and that he had not heard or understood what the appellant had said to him. At Darlington police station the respondent indicated that he was deaf and unable to hear anything said to him. The normal procedure under the 1967 Act was then followed by means of either writing down the questions asked of the respondent or showing to him printed material containing the information required by the Act to be conveyed to an arrested person in such circumstances. The respondent provided a specimen of breath which was positive, and he then elected to give a sample of blood, a forensic examination of which showed that it contained 215 milligrammes of alcohol per 100 millilitres of blood.

The justices were referred to *Alderson v Booth* (1), and expressed the opinion that, although the appellant had done all that would be required to effect an arrest in normal circumstances, because of the respondent's total deafness he (the respondent) was not aware that he was being arrested and was under compulsion to attend with the appellant at the police station. Consequently, they could not regard the respondent as a person properly arrested under s 6 (4) of the Road Traffic Act 1960 and they dismissed the information. The prosecutor appealed.

*B R Clapham* for the appellant.

*D P F Wheatley* for the respondent.

**BROWNE J:** Counsel who appeared for the appellant in this court put in without objection, although subject to some comment by counsel for the respondent, a copy of the document which came into existence at the police station in the course of those interviews. The first entry on that sheet, presumably written by the police officer is:

'You Maurice Lodge have been arrested by [the appellant] under section 6 Road Traffic Act 1960. You have an opportunity now if you wish to provide a breath test'

then there appears the respondent's signature. The procedure laid down by the Road Safety Act 1967 was then followed, a sample was taken, and it turned out to contain 215 milligrammes of alcohol per 100 millilitres of blood.

The justices record that they were referred to *Alderson v Booth* (1), a case about which I shall have to say something later. They stated their conclusions as follows:

'We were of the opinion that although [the appellant] had done all that would be required to effect an arrest in normal circumstances, because of the respondent's total deafness he, the respondent, was not aware that he was being arrested and was under compulsion to attend with the [appellant] at the police station. He had heard nothing and nothing had been done to indicate to him an arrest. Consequently we could not regard the respondent as a person properly arrested under section 6 (4) of the Road Traffic Act 1960 as referred to in section 3 (1) of the Road Safety Act 1967 and accordingly we dismissed the information.'

(1) 133 JP 346; [1969] 2 All ER 271; [1969] 2 QB 216.



We were referred to a number of authorities on this matter of arrest, beginning with *Christie v Leachinsky* (1). That was an action for false imprisonment. In that case the police officers who had arrested the plaintiff, as he afterwards was, had purported to arrest him under a local Act under which they had no power to arrest him, but they could equally have arrested him under common law powers on reasonable suspicion of theft and receiving; in fact they did not tell him anything about those other possible charges. The question in that case, therefore, was whether an arrest was lawful when the arresting officer had failed to tell the person arrested the reason for his arrest. VISCOUNT SIMON, who delivered the first speech in that case, after reviewing the authorities, stated a number of propositions which the House of Lords regarded as being established. The first and fifth of those iterations were:

'1. If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized . . .

'5. The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or by running away.

'There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter.'

It is clear that the House in that case were recognising that there might be other exceptions to the general rule besides the ones which they had mentioned.

The next case to which we were referred was *Tims v John Lewis & Co Ltd* (2) in the Court of Appeal and in the House of Lords. That again was an action for false imprisonment, and the plaintiff, among other things, said that she had not been told for what she was being arrested. The facts were that the plaintiff and her daughter had been in a shop of John Lewis's in Oxford Street; they had been seen by some store detectives to take some calendars in the Christmas card department, and the plaintiff was seen to put some in her handbag. The plaintiff and her daughter then went off to another shop where the evidence was that the daughter was seen to pick up a tablecloth. They then left the second shop and were arrested by the store detectives of John Lewis's who, I suppose, had followed them. The plaintiff's evidence was as set out in the report in the Court of Appeal:

'As we were coming out my daughter was in front, and there were two women. One put her hands up excitedly and said something. I did not catch everything. I could only say what I caught, but it was something about calendars and handkerchiefs and "You must come with me".'

The daughter also gave evidence about what the detectives said to her mother and herself.

LORD GODDARD CJ delivered the first judgment of the Court of Appeal in which ASQUITH and BIRKETT LJ agreed. After referring to *Christie v Leachinsky* (1), he said:

(1) 111 JP 224; [1947] 1 All ER 567; [1947] AC 573.

(2) [1951] 1 All ER 814; [1951] 2 KB 459; *rvsd* HL; 116 JP 275; [1952] 1 All ER 1203; [1952] AC 676.

'Can there be any doubt in this case that the plaintiff did know on what ground she was being taken into custody? Her whole case in the claim for slander was that one of the detectives had said: "You have taken calendars and handkerchiefs from John Lewis's. You must come with me." So far as I can see, the only ground she has for saying that she did not know for what she was being arrested was that she was rather hard of hearing, that she did not hear all of what the detective said, and has found out afterwards that that is what she did say. Assuming that that is so, I do not think that the decision of the House of Lords means that if an officer is arresting a deaf person, he has to possess himself of an ear-trumpet, or something of that sort, or shout at the top of his voice. He must do what a reasonable person would do in the circumstances. As I said during the course of the argument, if a police officer who is not able to speak French has to arrest a Frenchman who does not speak English, he can only tell him in English for what he is arresting him, and take him to the police station until some officer who does speak the language or some interpreter comes to explain the charge on which he has been arrested to the person arrested. In stating the charge or on suspicion of what crime a person is arrested, the person arresting without warrant has only to act reasonably. If you arrest without warrant, you arrest, as it has often been said, at your peril . . .'

LORD GODDARD went on to refer to another case, *Walters v W H Smith & Sons Ltd* (1), and then said:

'In my opinion this plaintiff cannot be in the position of saying that she did not know for what she was being arrested. The daughter's evidence was that the detective spoke to both of them and that they were quite close to each other. The plaintiff herself says that she heard enough to know that a charge was being put forward; and she heard the detective say to her: "You have taken calendars and handkerchiefs from John Lewis's. You must come with me." That is what she was being arrested for, and in my opinion that is no ground, in view of the decision in *Christie v. Leachinsky* (2), for saying that the arrest was unlawful.'

As I said, ASQUITH LJ agreed with the judgment of LORD GODDARD, but he had also said this in the course of argument:

'You cannot expect the person arresting to do more than what is reasonable to inform the person arrested of that with which he or she is charged. The plaintiff was hard of hearing.'

That case went to the House of Lords, and the decision of the Court of Appeal was reversed on another point, but in my judgment it is quite clear from the speech of LORD PORTER that the House of Lords agreed with the passage I have just read from the judgment of LORD GODDARD in the Court of Appeal. LORD PORTER, after referring to the evidence about what the plaintiff had heard, said:

'That testimony makes it apparent that the crime for which the arrest was made was plainly referred to. The respondent, it is true, denied all knowledge of the accusation until later, but she was deaf and there is nothing to indicate that the detectives had any reason to suspect that she could not hear what was said. They cannot, therefore, be at fault if the respondent did not hear. In my opinion, the decision in *Christie v Leachinsky* (2) has no bearing on such a case.'

As counsel for the respondent quite rightly points out, the finding in the *John Lewis*

(1) 78 JP 118; [1911-13] All ER Rep 170; [1914] 1 KB 595.

(2) 111 JP 224; [1947] 1 All ER 567; [1947] AC 573.

case was that in fact the plaintiff had heard what was said, and therefore what LORD GODDARD said about the position if he had not heard it is, I suppose, obiter. At the same time it is quite clear to me that that case is at least very strong persuasive authority for the view expressed by LORD GODDARD and I think LORD PORTER and certainly ASQUITH LJ that what the arresting officer must do is that which a reasonable person would do in the circumstances. *Christie v Leachinsky* (1) recognised that there were certain exceptions to the general rule about what must be brought home to a person being arrested, but left open the possibility that there can be other exceptions, and in my view the *John Lewis* case (2) recognised another exception.

The case on which the justices relied and on which counsel for the respondent also relied before us is the decision of this court in *Alderson v Booth* (3), and particularly the judgment of LORD PARKER CJ where he said:

'Equally it is clear, as it seems to me, that an arrest is constituted when any form of words is used which, in the circumstances of the case, were calculated to bring to the accused's notice, and did bring to the accused's notice, that he was under compulsion and thereafter he submitted to that compulsion.'

Counsel for the respondent contends in this case that, as the respondent did not know that he was being arrested, it was not brought to his notice that he was under compulsion, and if he did not know that he was under compulsion he could not have submitted to it.

The last authority to which I think I ought to refer is the very recent decision of this court in *R v Kulynycz* (4) which has been referred to as the King's Lynn case. I do not think that I need go through that case in detail; it actually turned on the question whether Norfolk Quarter Sessions had jurisdiction, which depended in turn on whether the appellant had been in lawful custody immediately before he was brought before the sessions. In effect the position there was that the appellant when he had originally been arrested had not been told for what he was being arrested, but very soon afterwards he was given what the court regarded as adequate information about the charges against him, and this court took the view that the original arrest which was unlawful in the sense that a civil action for false imprisonment could have been brought in respect of it, was put right by what happened afterwards at the police station when he was given information.

Counsel for the appellant puts the matter in two ways. First of all he says that the original 'arrest' at the respondent's home was a valid arrest because the appellant did everything that a reasonable person would do in the circumstances. He did not know that the respondent was deaf, and had no reason to believe he was deaf, and nobody on the police side discovered that he was deaf until after he got to the police station. Alternatively, he says that even if that is wrong and the original arrest was not valid, the matter was put right when the respondent got to the police station, and it was found out that he was deaf, and the written questions and answers and so on were put to him which brought home to him that he had been arrested. The second point was not taken in the magistrates' court and I do not propose to base my decision in this court on it; that point of course was based by counsel for the appellants on *R v Kulynycz* (4). But, in my judgment, the original arrest was a valid arrest.

As I have said, in my judgment the effect of the decision of the Court of Appeal and the House of Lords in *John Lewis's* case (2) was to recognise that there was a further

(1) 111 JP 224; [1947] 1 All ER 567; [1947] AC 573.

(2) [1951] 1 All ER 814; [1951] 2 KB 459; *rvsd* HL; 116 JP 275; [1952] 1 All ER 1203; [1952] AC 676.

(3) 133 JP 346; [1969] 2 All ER 271; [1969] 2 QB 216;

(4) p. 82 ante; [1970] 3 All ER 881.

exception to the general rule stated in *Leachinsky's* case (1) and that if a police officer arrests a deaf person or somebody who cannot speak English, he has to do what a reasonable person would do in the circumstances. Here it is quite plain that the appellant did everything that a reasonable person would have done in the circumstances, and the justices so found. They expressed the opinion that '[the appellant] had done all that would be required to effect an arrest in normal circumstances'.

In my judgment *Alderson v Booth* (2) does not really touch this point. That was a case where it was a normal situation and no complication arose; the person arrested could understand what was going on and in my view that does not touch or cut down what I regard as the exception recognised by the court in the *John Lewis* case (3). Accordingly, in my view, the justices came to a wrong conclusion in this case, and I would allow the appeal and remit the case to the justices with an intimation that the case was proved.

**ASHWORTH J:** I agree.

**LORD PARKER CJ:** I also agree.

*Case remitted.*

Solicitors: *Clarke, Rawlins & Co*, for *Waldy, Chaytor & Jacks*, Darlington; *Oswald Hickson, Collier & Co*, for *Meek, Black & Cleminson*, Darlington.

T.R.F.B.

(1) 111 JP 224; [1947] 1 All ER 567; [1947] AC 573.

(2) 133 JP 346; [1969] 2 All ER 271; [1969] 2 QB 216.

(3) [1951] 1 All ER 814; [1951] 2 KB 459; *rvsd* HL; 116 JP 275; [1952] 1 All ER 1203; [1952] AC 676.

### QUEEN'S BENCH DIVISION

(LORD PARKER, C.J. ASHWORTH AND BROWNE, JJ)

4th November 1970

LADBROKE (FOOTBALL) LTD. AND OTHERS v PERRETI

*Gaming—Forecast of future event—Photograph of players taken during football match—Ball not in photograph—Competitors required to mark most likely position of ball—Position later chosen by panel of judges—Success of competitors marking positions closest to that chosen by panel—Betting, Gaming and Lotteries Act, 1963, s. 47 (a) (i).*

The first appellants were convicted at a magistrates' court of unlawfully conducting through newspapers a competition called 'Spot-ball' in which prizes were offered for the forecast of a future event, namely, the decision of a panel of experts, contrary to s 47 (1) (a) of the Betting, Gaming and Lotteries Act 1963. The entry forms for the competition published in the newspapers contained a photograph of an incident in a football match, showing several players in action. Competitors were required to mark the most likely position of the ball at that time. Later a panel of football experts selected the position which they thought to be correct, and the prizewinners in the competition were those who had marked positions closest to that selected by the panel. On appeal by the appellants against conviction,

**HELD:** while it was true that the competitor was making his own attempt to find where the ball was likely to be, he was also making a forecast of the result of a future event, namely, the adjudication and decision of the panel within the meaning of s 47 (1) of the Act, and, therefore, the convictions were right.

CASE STATED by a metropolitan stipendiary magistrate.

Informations were preferred by the respondent, John Perrett, a chief inspector of the Metropolitan Police, against the first appellants, Ladbroke (Football) Ltd, that they on sundry dates unlawfully conducted through sundry newspapers a competition call 'Spot-ball' in which prizes were offered for the forecast of the result of a future event, namely, the decision of a panel of experts, contrary to s 47 (1) (a) (i) of the Betting, Gaming and Lotteries Act 1963. Informations were also preferred by the respondent against the other appellants, News of the World Ltd, Daily Mirror Newspapers Ltd, Odhams Newspapers Ltd, Beaverbrook Newspapers Ltd, and Associated Newspapers Ltd, all companies publishing newspapers, that they on sundry dates aided, abetted, counselled and procured the alleged summary offences by the first appellants, contrary to s 47 (1) (a) (i) of the 1963 Act and s 35 of the Magistrates' Courts Act 1952.

On the hearing of the informations at Wells Street Magistrates' Court on 21st, 22nd and 24th April 1970, the magistrate held that the decision of the panel was the result of an event; that prizes were offered by the first appellants for forecasts of the decision of the panel; and that all the appellants must be taken to have been fully aware of the nature of the competition. He accordingly convicted the appellants on all the informations, imposing a fine of £15 on each appellant in respect of each information and making an order for £50 costs to be paid by the first appellants and a total of £50 costs to be paid by the newspaper companies. The appellants appealed.

*T H Bingham* for the first appellants.

*M Finer QC* and *T H Bingham* for the newspaper companies.

*M D L Worsley* for the respondent.

**LORD PARKER CJ:** This is an appeal by way of Case Stated against certain decisions of one of the metropolitan stipendiary magistrates sitting at Wells Street magistrates' court. The informations were directed to the first appellants, Ladbroke (Football) Ltd, that they unlawfully conducted through sundry newspapers a competition called 'Spot-ball' for which prizes were offered for the forecast of the result of a future event contrary to s 47 (1) (a) (i) of the Betting, Gaming and Lotteries Act 1963. The informations against the other appellants, all of whom were newspaper companies, alleged the aiding and abetting of the offences committed by the first appellants.

Before turning to the legislation, it is convenient to summarise the facts. The competition was published in advertisements in certain newspapers, which advertisements themselves contained the entry forms for the competition. To take as a specimen an advertisement in the "News of the World" for 5th October 1969, one sees a substantial advertisement headed 'Greatest "Spot-ball" Ever' and providing for prizes, and at the end is set out a reproduction of a photograph of certain players taken during a Chelsea v Arsenal match, in conditions which were dry. The ball itself is eliminated from the photograph and in its place is a grid of some 40 squares. The competitor for 1s could fill up eight of those squares, being the eight squares in which in his opinion the ball was most likely to be. He could choose, and fill up with a cross, more than eight squares, indeed 13, for an extra entry fee. The winners were to be named the following week, and meanwhile there was to be a meeting of a panel of experts. That panel would go through the same process that the competitors were expected to go through, of finding the eight squares where the ball was most likely to be. The panel having arrived at its decision, the entry forms would then be examined, and those competitors who had chosen the same eight squares as the panel would be entitled to prizes. It is to be observed that it was not a competition to

find out where the ball was. It may be that the winning eight squares would not in fact contain the ball at all; it may be, in other words, that the panel, expert as it was, would itself have been wrong and would have chosen eight squares where in fact the ball had not been—that matters not. The full print contained in the advertisement under the heading 'How you can win' is worded thus:

'Study the photograph carefully. The ball is not shown in the picture but it is in the area covered by the grid. The picture contains sufficient information to enable a skilful competitor to decide in which eight squares the ball is most likely to be. You can put crosses in a maximum of thirteen squares. The prizes are offered for the most skilful selections based on that information and their skill will be judged by reference to the decision of a panel of football experts chaired by Alan Mullery, captain of Spurs and England player, who will be using the same information as is available to you. The winning eight squares will be published in next week's competition and the competitor with those squares will win the first prize of £5000.'

Apart from what I have recited, the Case finds as a fact that on the Friday following these advertisements, the panel met, and that it consisted of Mr Alan Mullery, of a Mr Kent, a professional photographer specialising in football photography, and Mr Stoney, a professional competition adjudicator. The meeting was also attended by Mr Thompson, an officer of the first appellants, but he acted as secretary only.

The magistrate goes on to find that the panel had before it the photograph for each week's competition exactly as published in the newspaper, including the grid, and showing no ball, and goes on to say that the photograph which they had might have been a little clearer than the version which appeared in the newspapers. Finally it was said:

'The meetings of the panel consisted [sic] of a detailed analysis of the data contained in the photograph, the members discussing and drawing inferences according to their experience of football, from the postures of the players, the direction in which they were seemingly looking and appeared to be moving, the markings on the field, the ground conditions, the position of the referee where he was shown, the teams involved, the identity and characteristics of individual players and so on. These discussions usually lasted about three quarters of an hour. Finally on the data available, the panel decided on the eight most likely squares on the grid for the position of the ball to be found and these were noted. The reasons for the panel's choices were recorded and also their reasons for rejecting the squares which they did not choose.'

Section 47 (1) of the Betting, Gaming and Lotteries Act 1963 constitutes the alleged offence, and, so far as it is material, provides:

'It shall be unlawful to conduct in or through any newspaper, or in connection with any trade or business or the sale of any article to the public—(a) any competition in which prizes are offered for forecasts of the result either—(i) of a future event . . . (b) any other competition success in which does not depend to a substantial degree upon the exercise of skill . . .'

I mention para (b) for two reasons. One is that the appellants were also charged with an offence against s 47 (1) (b), and were quite rightly acquitted, because there must be a considerable element of skill in this competition. The second reason for which I mention it is that counsel for the newspaper companies, I think as at present advised quite rightly, conceded that para (a) and para (b) were wholly independent, and that



there could be an offence under para (a) although, as here, there was an element of skill. In other words para (a) is not coloured, as it were, by para (b).

What was urged before the magistrate and has been urged before this court is a very forceful argument by counsel for the newspaper companies is really twofold. For two broad reasons he submits that the competition here could not properly be called a competition in which prizes are offered for forecasts of the result of a future event. He emphasised that the words are not 'forecast a future event', but to forecast the result of a future event. Various classic illustrations have been given: the event the Derby, the result, the winner. The general election the event followed by the result, the winner. It is said that it is inconceivable that the legislature intended to cover a case such as this, and indeed the words are quite inept when the result is in effect the decision of the panel; that one is forecasting the decision of the panel, and that it is wholly artificial to split up the decision of the panel into an event and a result. The prosecution contended that the event here was the Friday meeting of the panel and its deliberations for three-quarters of an hour. The result was the eight squares eventually chosen by the panel. For my part, while appreciating the argument of counsel for the newspaper companies, I should have thought that what happened here, the deliberations and then the result, could quite fairly and squarely be said to come within the words of the Act. In support of his argument counsel said: 'But what if the judge in such a competition as this is but one man who does it in that way?' For my part, I would not shrink from saying that the event in such a case was his entry into consideration of the matter and consideration of the matter, and the result was the decision at which he finally arrived.

The second point that counsel for the newspaper companies took can be put in this form. Even if I am wrong and there can truly be said here to have been an event and a result of that event, even so, the competitors here were not seeking or attempting to forecast the result, that is, the decision arrived at by the panel after an event, the meeting and the deliberation. They were doing what they were told to do by the small print in the advertisement, namely, to decide in which eight squares the ball was most likely to be. He said with considerable force that not only is that what they were told to do, but what any competitor would naturally do. He would not, so it is said, attempt to ascertain what three other people might choose; he would concentrate on what he, using such football skill as he had, thought were the eight squares in which the ball was most likely to be. Counsel said that it may be true that the competitor's skill in choosing those eight squares may be judged in the end by the decision arrived at by the panel, yet that is only to confuse what is being attempted, namely, to decide in which eight squares the ball is most likely to be with what he calls the machinery of judging the skill so exercised. That is an attractive argument, but in my judgment it is wrong. True, and I accept it, the competitor is doing what he is told to do, to decide in which eight squares the ball is most likely to be. That is what he is directly putting his mind to, but at the same time, in the result he is in fact trying to forecast what the panel thinks by its decision are the eight squares in which the ball is most likely to be. Put I think in its simplest form, it is this. It is not what the competitor is directly attempting to do or thinks that he is doing but what in fact he is doing that matters. In fact, whether he knows it or not, by reason of the panel being the judges, he is trying to arrive at a solution which will accord with the decision of the panel. On those short grounds I would agree with the learned magistrate in this case that the first appellants committed an offence and dismiss the appeal by them.

So far as the newspaper companies are concerned, the fact, of course, remains that they cannot be liable as aiders and abettors unless it can be shown that they knew or had constructive knowledge of the constituent facts constituting the offence.

Counsel for the newspaper companies has urged that it can properly be said that they did not know (and it has been going on, he said, for some 35 years) or suspect that forecasting of this kind could be said to be the forecasting of the result of an event within the Act. For my part, however, I find it impossible to accede to that argument. They knew all the facts, albeit they did not realise that an offence was being committed. Accordingly I would dismiss the appeal against the appellant newspaper companies' convictions likewise.

**ASHWORTH J:** I agree. In deference to the argument of counsel for the newspaper companies I would like to add just a word or two of my own. In s 47 of the Betting, Gaming and Lotteries Act 1963 the offence created is the conducting through a newspaper of a competition in which prizes are offered. Stopping there, it is quite plain that on the facts proved in this case those words were satisfied. They are followed by the words 'prizes are offered for forecasts of the result of a future event'. Where I part company with counsel for the newspaper companies is in this way. Most of his argument was directed to showing what he urged was in the mind of a competitor. He was making a forecast by his entry, as directed by the instructions, as to the eight squares in which the ball was most likely to be. If one was entitled merely to look at this matter from that limited angle, it might well be said that this was not a forecast of the result of a future event. As it seems to me, that is shutting one's eyes to the true nature of this competition. It certainly was a competition; it was a competition in which the object of each competitor was to win a prize. He would only win a prize if the forecast which he sent in coincided with the decision of the panel which was to adjudicate on the entries.

Accordingly, in my judgment, when a competitor sent in his entry he was in effect doing two things. In the first place he was, as directed, making his own attempt to show in which square the ball was most likely to be, but by the very fact that he was entering this competition on the terms disclosed in the Case, he was also making a forecast of the result of the future event, namely, the adjudication by the panel and their decision on it. That one entry had two purposes, and one of them was the forecasting of the future event, and for those reasons, which are only a variant of what LORD PARKER has said, I would agree that these appeals fail.

**BROWNE J:** I also agree.

*Appeal dismissed.*

*Solicitors: Stilgoes; Theodore Goddard & Co; Solicitor, Metropolitan Police.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(WILLIS, J)

11th, 12th November, 19th December 1969

H LAVENDER AND SON LTD v MINISTER OF HOUSING AND LOCAL  
GOVERNMENT

*Town and Country Planning—Refusal of planning permission—Appeal to Minister—Decision in accordance with general policy—Need for genuine consideration of particular matter—Town and Country Planning Act, 1962, s 179 (1) (3) (b).*

The Minister of Housing and Local Government is entitled to have a policy and to decide an appeal to him under s 179 (1) of the Town and Country Planning Act, 1962, in the context of that policy, and he can reject any recommendation of an inspector which runs counter to his policy, for he has a duty to secure consistency and continuity in the framing and execution of a national policy respecting the use and development of land. The courts have no authority to interfere with the way in which he carries out his policy, and there is no question but that before making a decision whether or not to allow an appeal he may obtain the view of other government Departments. But, if he has prejudiced or failed to give any genuine consideration of the matter before him, he has failed to carry out his statutory duty. Accordingly, where the Minister refused planning permission solely in pursuance of a policy not to permit minerals in an agricultural reserve to be worked unless the Minister of Agriculture was not opposed to their being worked,

Held: the Minister had failed to exercise a proper, or, indeed, any, discretion by reason of the fetter which he had imposed on its exercise in acting solely in accordance with his stated policy, and the order would be quashed.

MOTION by H Lavender & Son, Ltd, for an order under s 179 of the Town and Country Planning Act, 1962, quashing an order made by the Minister of Housing and Local Government.

Douglas Frank QC and K H T Schiemann for the applicants.  
Gordon Shynn for the Minister.

*Cur adv vult*

19th December 1969. **WILLIS J** read the following judgment: Counsel for the applicant applies under s 179 of the Town and Country Planning Act 1962 to quash a decision of the Minister of Housing and Local Government (hereinafter referred to as the Minister) given on 14th April 1969, whereby he dismissed an appeal made to him by the applicants against the decision of the second respondents, the Walton and Weybridge Urban District Council, refusing the applicants planning permission to extract sand, gravel and ballast from about 42 acres of land at Walton-on-Thames, part of an agricultural holding of 108 acres known as Rivernook Farm.

The background of this case is the report of the Advisory Committee on Sand and Gravel, known as the Waters Report. It appeared partially in 1948, and was completed in 1953. The terms of reference, so far as material to the present appeal, were:

'To make recommendations on future policy for the control under the Town and Country Planning Acts of the extraction of sand and gravel, with particular regard to the following: (a) the need for maintaining adequate sand and gravel supplies at a cost which is reasonable in all the circumstances; (b) the need for ensuring that the necessary disturbance to agricultural land is reduced to a minimum and confined as far as possible to the land of less agricultural value.'

In para 55 of Part 1 (General Survey) of the report it is stated:

'We therefore feel that it is of the greatest importance for securing a proper perspective in this matter to realise... (b) that if suitable filling material is available, all wet pits may be capable of subsequent agricultural production; (c) that, though there will in most cases be diminution of the original fertility, the measure of productivity remaining may nevertheless be substantial.'

In para 64 of Part 18 (Final General Part) of the report (published in 1953), after a reference to para 55, it is stated:

'We consider that the principles at (c) should be modified, for we are now satisfied that if suitable methods of after-care are adopted the ultimate productivity of the land may approach, and in some cases even exceed, that of the original site.'

Finally in para 106 (c) of Part 2 (Greater London) (published in 1948), it was recommended that certain very high-quality agricultural land should be protected against disturbance by gravel working and reserved indefinitely for agriculture. The greater part of the appeal site is within such a reservation area.

The applicants bought the appeal site in 1965 as a gravel reserve from a Mr Barker, who had continued to farm it with the rest of the farm as a market garden. Consequent on a threat to a considerable part of their main working site at Hershams by a proposal of the South Eastern Gas Board to acquire some 25 acres as a gas works, the applicants applied in February 1966 for planning permission to work the appeal site. The county planning committee of the Surrey County Council embarked on a number of consultations with interested parties, including the Minister of Agriculture, Fisheries and Food. The latter, in recording his view on 27th April 1966, stated (*inter alia*):

'The Minister is anxious to safeguard valuable agriculture land as far as possible and I am directed to advise you that in his opinion there is strong objection to the proposed development on agriculture grounds. Should the authority consider that there is a case for granting permission on other grounds, the Department will be glad to discuss the position further.'

The application was then advertised, and resulted in only one letter of objection. Thereafter the county planning committee recommended on 5th October 1966 that planning permission should be granted subject to suitable conditions, including conditions as to restoration of what would become a wet pit, those being conditions acceptable to the applicants. There followed discussions between the local planning authority and the Land Commissioner, but the latter confirmed that the Minister of Agriculture, Fisheries and Food maintained his objection since, as he said, the applicants would have sufficient land in hand for the time being because the gas plant proposals had by then been withdrawn.

On 21st February 1967, the applicants again wrote to the local planning authority stressing the urgency of the time factor to them. In March 1967, the mineral extraction sub-committee of the local planning authority resolved (a) that the county planning officer be requested to ascertain from the Land Commissioner whether his objection to the excavation of gravel at Rivernook Farm would be sustained permanently, and (b) that in the event of the Land Commissioner not intending to sustain his objection permanently, a recommendation should be made to refuse permission on the ground of prematurity and in such an event that the applicants should be told that a new application would be considered in the future. The Land Commissioner wrote on 3rd April 1967 confirming that the Department was still of the opinion that land of this quality should remain in agricultural use. This somewhat ambiguous reply was taken by the local planning authority to indicate that the

Minister of Agriculture regarded his objection as one which would be permanently sustained. There was nothing in the events that followed to indicate that it was in error in doing so. In the result, the planning authority, having no objection to the application on either amenity or highway grounds, and, in view of the objection of the Ministry of Agriculture, not wishing to prejudice that objection by refusing the application solely on the grounds of prematurity, refused permission on the agricultural grounds set out in the first part of the Land Commissioner's letter of 27th April 1966, referred to above. It was in the foregoing circumstances that the matter came on for hearing by way of appeal from the second respondents, acting for the local planning authority on 17th and 18th October 1968, before an inspector of the Minister of Housing and Local Government, who reported in writing to the first respondent on 28th November 1968.

It is unnecessary to make more than a few references to the report before I come to the inspector's conclusions. There was virtually no dispute between the applicants and the local planning authority. Mr Barker, the farmer, supported the appeal. Mr Furneaux, a very distinguished soil consultant, was called to support the applicants' claim that they were able, as they were willing, to restore the land to a high standard of fertility after excavation of the mineral, and Mr Alexander, the Senior Assistant Land Commissioner, was called in support of what was, in effect, the only objection of any substance to the application, namely, that of the Ministry of Agriculture adopted in form by the local planning authority. So far as material, his views insofar as they were not in agreement with those of Mr Furneaux, were recorded in the report as follows:

'64. [The] Minister is not concerned with the [applicants] nor with the horticultural tenant. His policy is to safeguard better quality land on the long term basis and he does not want the land in the site to be disturbed.

'65. The restoration of wet gravel workings presents problems of special difficulty and his Department know of no large scale wet workings that have been restored successfully to horticultural cropping. He does not doubt the [applicants'] intentions and he agrees that if the site was restored as has been described by them, the land would have a quality, apart from some settlement, equivalent to its present quality...

'66. Restoration needs very close supervision and this is difficult to provide because of shortage of staff...

I now come to the inspector's conclusions, which, so far as material, state:

'76. In my view these questions should be considered in the light of existing circumstances, and the present time appears to be appropriate for the removal of the minerals. The applicants are experienced in the work of restoring land and Mr. Barker would not be expected to give such strong support unless he envisages some benefit for himself from the restored land. Satisfactory back filling materials are available in adequate quantities and working the appeal site conjointly with the Fieldcommon Lane site would, by switching activities between the two, enable the selection of the most suitable weather conditions for restoration operations at the appeal site.

'77. This sort of combination of favourable circumstances is uncommon, and it affords a valuable opportunity for the restoration of the land in a desired manner...

'78. The issue in this case rests upon whether the areas allocated to agricultural reserves in the Waters Report are inviolable. If they are not inviolable, the present proposal for the appeal site should be allowed subject to suitable conditions...

'79. On the other hand, if the agricultural reserves are inviolable the present application should be turned down. I am not in a position to come to a decision on the question whether the agricultural reserve areas are inviolable, therefore I make no recommendation.'

It is, thus, clear that the inspector, left to himself, would have allowed the appeal, rejecting both the agricultural objection and the arguments on prematurity on their merits. The Minister gave his decision on 14th April 1969. The letter set out verbatim the inspector's conclusions and proceeded in para 3 as follows:

*'The Minister has considered his inspector's conclusions and appreciates his reasons for not making a recommendation. He notes that the inspector would have recommended that the appeal should be allowed if the "agricultural reservations" were not to be regarded as inviolable; and he appreciates that the proposals for restoring the land after working have been very carefully thought out. Nevertheless, in weighing the need for sand and gravel against the preservation of high quality agricultural land, he has had to take note of the fact that the appeal site lies within the "agricultural reservations", which [the Waters Committee] recommended should be reserved indefinitely for agriculture. It is the Minister's present policy that land in the reservations should not be released for mineral working unless the Minister of Agriculture, Fisheries and Food is not opposed to working. In the present case the agricultural objection has not been waived, and the Minister has therefore decided not to grant planning permission for the working of the appeal site.'*

He dismissed the appeal. It is those last two sentences in the decision letter which lie at the heart of the matter in issue; and it is submitted first of all by counsel for the applicants that they show, in this case, that the Minister had so fettered his own discretion to decide the appeal by the policy which he had adopted that the decisive matter was not the exercise of his own discretion on a consideration of the report and other material considerations, but the sustained objection of the Minister of Agriculture. In effect, he says that the decision was not that of the Minister of Housing and Local Government, the tribunal entrusted with the duty to decide, but the Minister of Agriculture, who had no status save perhaps in a consultative capacity and certainly no status to make the effective decision.

It is not, I think, suggested by counsel for the Minister that the Minister of Agriculture has any status at such an inquiry as was conducted in this case, save insofar as either the applicants or the local planning authority required the attention of a Ministerial witness, nor that there is any statutory requirement for the Minister of Agriculture to be consulted at any stage, either before or after the hearing. As a matter of practice, nevertheless, the Ministry of Agriculture is invariably consulted by the local planning authority in the case of such an application as was made in the present instance, and I would expect the Ministry of Housing and Local Government to follow a similar practice where agricultural land is involved. The statutory duties of the Minister in a case such as this are laid down in ss 17 and 23 of the Town and Country Planning Act 1962, and in the Town and Country Planning (Inquiries Procedure) Rules 1965. Section 23 (1) gives a right of appeal to the Minister. Section 23 (4) enables the Minister to allow or dismiss the appeal or to vary the decision of the local planning authority, and to deal with the application as if it had been made to him in the first instance. Section 23 (5) requires the Minister to direct a hearing before an inspector, if either the applicant or the local planning authority desire it, before he determines the appeal, and s 23 (6) applies, with any necessary modifications, s 17 (1) which, so far as material, provides:



'where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—(a) may grant planning permission, either unconditionally or subject to such conditions as they think fit, or (b) may refuse planning permission.'

Rule 9 of the 1965 rules lays down the procedure whereby an applicant for planning permission can require the attendance of a witness from a government Department, which, on consultation by the local planning authority, has expressed the view that the application should not be granted, or from the Ministry of Transport where that Minister has given a direction restricting the grant of permission. Rule 12 (2) provides:

'(2) Where the Minister—(a) differs from the appointed person on a finding of fact, or (b) after the close of the inquiry receives any new evidence . . . or takes into consideration any new issue of fact (not being a matter of government policy) which was not raised at the inquiry, and by reason thereof is disposed to disagree with a recommendation made by the'

inspector he must first notify the parties if he proposes to depart from the recommendations and if he thinks proper to re-open the inquiry.

In general support of his main submission, counsel for the applicants has referred me to Professor de Smith's well-known work *Judicial Review of Administrative Action* and to certain of the cases cited therein. He really puts his argument in two ways: (i) that the Minister has fettered his discretion by a self-created rule of policy; and (ii) that the Minister, who has a duty to exercise his own discretion in determining an appeal, has in this case delegated that duty to the Minister of Agriculture, who has no such duty and is, statutorily, a stranger to any decision. It is, of course, common ground that the Minister is entitled to have a policy and to decide an appeal in the context of that policy. He can also differ from the inspector on any question of fact and disagree with the inspector's conclusion and recommendations. He can, and no doubt should, reject any recommendation of an inspector which runs counter to his policy, since, as counsel for the Minister points out, it is of the very essence of the duties laid on the Minister by s 1 of the Minister of Town and Country Planning Act 1943 that he should secure consistency and continuity in the framing and execution of a national policy with respect to the use and development of land.

The courts have no authority to interfere with the way in which the Minister carries out his planning policy (see per LORD DENNING MR in *Lord Luke of Pavenham v Minister of Housing and Local Government* (1)). There is also no question but that the Minister, before making a decision whether or not to allow an appeal, may obtain the views of other government Departments (see *Darlassis v Minister of Education* (2) per BARRY J). The duties of the Minister and their extent in relation to a matter such as the appeal in the present case, comprising in a hybrid form both administrative and quasi-judicial functions, were enunciated by LORD GREENE MR in a well-known passage in *B Johnson & Co (Builders) Ltd v Minister of Health* (3).

'The duty placed on the Minister with regard to objections is to consider them before confirming the order. He is also to consider the report of the person who held the inquiry. Having done that, his functions are laid down by the last words

(1) 131 JP 425; [1967] 2 All ER 1066; [1968] 1 QB 172.

(2) (1954), 118 JP 452.

(3) 111 JP 508; [1947] 2 All ER 395.

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<b>CRIMINAL LAW</b> – Appeal – Application of proviso to s 2 (1) of the Criminal Appeal Act, 1968. <b>R v Pink</b> .. .. .	CA	32
<b>CRIMINAL LAW</b> – Blackmail – ‘Makes an unwarranted demand’ – Demand in letter written and posted in England to person abroad – Theft Act, 1968, s 21 (1). <b>Treacy v Director of Public Prosecutions</b> .. .. .	HL	112
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<b>CRIMINAL LAW</b> – Corruption – Act ‘in relation to principal’s affairs’ – Defendant employee of car company – Defendant also performing trade union duties – Act in relation to trade union affairs also act in relation to company’s affairs – Prevention of Corruption Act, 1906, s 1 (1). <b>Morgan v Director of Public Prosecutions</b> .. .. .	QBD	86
<b>CRIMINAL LAW</b> – Costs – Payment by convicted person – Order not to be made unless defendant has private capital. <b>R v Gaston</b> .. .. .	CA	157 ftnt.
<b>CRIMINAL LAW</b> – Dangerous drug – Possession – Evidence – Minute quantity of drug found on analysis. <b>R v Marriott</b> .. .. .	CA	165
<b>CRIMINAL LAW</b> – Evidence – Confession – Defendant informed that third person has accused him of offence – No explanation or disclaimer. <b>Hall v Reginam</b> .. .. .	PC	141
<b>CRIMINAL LAW</b> – Evidence – Cross-examination of co-prisoner on character – Evidence given by co-prisoner against prisoner – Charged ‘with the same offence’ – ‘Same offence’ – Possession by two prisoners of forged notes not joint but immediately successive – Criminal Evidence Act, 1898, s 1 (f), proviso (iii). <b>R v Russell</b> .. .. .	CA	78
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<b>CRIMINAL LAW</b> – Obtaining pecuniary advantage by deception – Betting transaction – Operative inducement – Theft Act, 1968, s 16 (2) (a) (c). <b>R v Aston. R v Hadley</b> .. .. .	CA	89
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<b>CRIMINAL LAW</b> – Theft – Ingredients of offence – Consent of owner obtained by dishonesty – Facts proved justifying conviction of obtaining property by deception – No bar to conviction for theft – Theft Act, 1968, s 1 (1), s. 2 (1) (b), s 15 (1).		
<b>R v Lawrence</b> .. .. .	CA	144
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<b>Ladbroke (Football) Ltd v Perrett</b> .. .. .	QBD	181
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<b>R v Birmingham City Justices. Ex parte Chris Foreign Foods (Wholesalers) Ltd</b> .. .. .	QBD	73
<b>RACE RELATIONS</b> – Housing – Council houses – Tenants restricted to British subjects – Validity – Action for declarations by local authority – Competency – Race Relations Act, 1968, s 2 (1), s 19 (10).		
<b>London Borough of Ealing v Race Relations Board</b> .. .. .	QBD	131
<b>RATING</b> – Machinery and plant – Generation of power – Electric motors, hydraulic pumps, and air compressors – Motive power derived from electricity supplied to factory – Hydraulic and pneumatic power distributed throughout factory – Rating and Valuation Act, 1925, s 24 (1), Sched 3 (1) (a) – Plant and Machinery (Rating) Order, 1960, Sched.		
<b>Chesterfield Tube Co Ltd v Thomas (Valuation Officer)</b> .. .. .	CA	1

of [para 4 of Sch 1 to the Housing Act 1936] viz., "and may then confirm the order either with or without modification". Those words are important, because they make it clear that it is to the Minister that Parliament has committed the decision whether he will or will not confirm the order after he has done all that the statute requires him to do. There is nothing in that paragraph, or anywhere else in the Act, which imposes on the Minister any obligation with regard to the objections, save the obligation to consider them. He is not bound to base his decision on any conclusion that he comes to with regard to the objections, and that must be so when one gives a moment's thought to the situation. The decision whether to confirm or not must be made in relation to questions of policy, and the Minister, in deciding whether to confirm or not, will, like every Minister entrusted with administrative duties, weigh up the considerations which are to affect his mind, the preponderating factor in many, if not all, cases being that of public policy, having regard to all the facts of the case . . . That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections, *vis-a-vis* the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue.'

Can there, nevertheless, come a point in this hybrid process when the court can interfere with a Ministerial decision which, *ex facie*, proceeds on a consideration of the inspector's report and concludes by applying Ministerial policy? Counsel for the applicants submits that such a point can be reached and has been reached in this case. It is reached, he says, if a tribunal, entrusted with a discretion as the Minister was in the present case, disables itself from exercising that discretion in a particular case by the prior adoption of a general policy. In *R v Port of London Authority, ex parte Kynoch Ltd* (1), BANKES LJ said:

'In the present case there is another matter to be borne in mind. There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case . . . On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made.'

In another licensing case, *R v County Licensing (Stage Plays) Committee of Flint County Council, ex parte Barrett* (2) where the decision was given in the interests of consistency, JENKINS LJ said:

'Then they went on . . . to conclude . . . that the Queen's Theatre licence must follow the fate of the Pavilion Theatre licence, because it was essential that the same rule should be applied in all cases or, in other words, that the committee should be consistent. I cannot think that that method of approach fulfils the requirement that the matter should be heard and determined according to law . . . It seems to me that it wrongly pursues consistency at the expense of the merits of individual cases.'

I have referred to these two cases since they were relied on by counsel for the applicants, but I am inclined to agree with counsel for the Minister that the considerations applicable to licensing cases are not of much assistance when considering the scope of a Minister's duties within a statutory framework.

(1) 83 JP 41; [1919] 1 KB 176.

(2) 121 JP 80; [1957] 1 All ER 112; [1957] 1 QB 350.

The nearest case to the present which was referred to in argument on this aspect of the case is *Myton Ltd v Minister of Housing and Local Government* (1). It concerned an application to develop land in an area of Leeds affected by what was known as a 'sketch plan' for a green belt, in other words, tentative proposals made ex parte without having reached the stage of being part of the development plan. The argument (which did not in the result succeed) was that there was a duty on the Minister to address his mind to the question whether the appeal site was required for the green belt and, if the circumstances justified it, to allow development, and that he had failed in this duty. WIDGERY J said:

'I accept Mr. Bridge's contention that there is such a duty on the Minister. I think that it would be lamentable if in circumstances where a sketch plan has been prepared and where there is in effect a tentative proposal for a green belt, all applications for development within that green belt area should be automatically and peremptorily refused merely because provision of a green belt was in contemplation . . . The local planning authority's decision in this case is not for review before me, but I am bound to observe that the very speed with which they disposed of the application at least raises some suspicion that they dealt with the matter as being already pre-judged by the fact that the land was within the sketch plan green belt.'

It is, of course, clear that if the Minister has prejudged any genuine consideration of the matter before him, or has failed to give genuine consideration to (inter alia) the inspector's report, he has failed to carry out his statutory duties properly: see *Franklin v Minister of Town and Country Planning* (2).

In the present case counsel for the applicants does not shrink from submitting that the decision letter shows that no genuine consideration was given to the question whether planning permission could, in the circumstances, be granted. I have carefully considered the authorities cited by counsel, but I have not found any clear guide to what my decision should be in this case. I have said enough to make it clear that I recognise that in the field of policy, and in relation to Ministerial decisions coloured or dictated by policy, the courts will interfere only within a strictly circumscribed field (see per LORD GREENE MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* (3)). It is also clear, and is conceded by counsel for the Minister, that where a Minister is entrusted by Parliament with the decision of any particular case he must keep that actual decision in the last resort in his own hands (see *R v Minister of Transport, ex parte Grey Coaches* (4)). I return, therefore, to the words used by the Minister. It seems to me that he has said in language which admits of no doubt that his decision to refuse permission was solely in pursuance of a policy not to permit minerals in the Waters agricultural reserves to be worked unless the Minister of Agriculture was not opposed to their working. Counsel for the Minister submits that, read as a whole, the decision letter should be taken as implying some such words as: 'I have gone through the exercise of taking all material considerations into account, but you have not persuaded me that this is such an exceptional case as would justify me in relaxing my policy; therefore I stick to it and apply it'. If that were the right construction perhaps counsel for the Minister would be justified in saying that there was no error in law. But in my judgment the language used is not open to any such implication. There is no indication that this might be an exceptional case such as would or could induce the Minister to change his policy. It is

(1) (1963), 61 LGR 556.

(2) 111 JP 497; [1947] 2 All ER 289; [1948] AC 87.

(3) 112 JP 65; [1947] 2 All ER 680; [1948] 1 KB 223.

(4) (1933), 77 Sol Jo 301.

common ground that the Minister must be open to persuasion that the land should not remain in the Waters reservation. How can his mind be open to persuasion, how can an applicant establish an 'exceptional case' in the case of an inflexible attitude by the Minister of Agriculture? That attitude was well known before the inquiry, it was maintained during the inquiry, and presumably thereafter. The inquiry was no doubt, in a sense, into the Minister of Agriculture's objection, since, apart from that objection, it might well have been that no inquiry would have been necessary, but I do not think that the Minister, after the inquiry, can be said in any real sense to have given genuine consideration to whether, on planning (including agricultural) grounds, this land could be worked. It seems to me that by adopting and applying his stated policy he has in effect inhibited himself from exercising a proper discretion (which would of course be guided by policy considerations) in any case where the Minister of Agriculture has made and maintained an objection to mineral working in an agricultural reservation. Everything else might point to the desirability of granting permission, but by applying and acting on his stated policy I think that the Minister has fettered himself in such a way that in this case it was not he who made the decision for which Parliament made him responsible. It was the decision of the Minister of Agriculture not to waive his objection which was decisive in this case, and while that might properly prove to be the decisive factor for the Minister when taking into account all material considerations, it seems to me quite wrong for a policy to be applied which in reality eliminates all the material considerations save only the consideration, when that is the case, that the Minister of Agriculture objects. That means, as I think, that the Minister has by his stated policy delegated to the Minister of Agriculture the effective decision on any appeal within the agricultural reservations where the latter objects to the working. I am quite unable to accept that in these circumstances the public inquiry could be justified, as counsel for the Minister submits, as giving the Minister of Agriculture the opportunity to hear the case and, if he thought right, to waive his objection. Unless there was a real chance that he would do so—and it seems to me clear beyond question that there was not—the inquiry was quite futile, in my view, certainly as a means of providing the Minister with the material on which he could have exercised, and should have exercised, a genuine, unfettered discretion.

As counsel for the applicants submits, a policy which prohibited all development in a national park where there was an objection by the National Parks Commission which was not withdrawn, or to confirm all building preservation orders unless the Royal Fine Art Commission approved, would plainly vitiate a decision reached in accordance with that policy by a tribunal which is given a discretion. I think that he is right, and I can find no real distinction between such hypothetical cases and the Minister's stated policy in this case. If the Minister was intending to follow his stated policy, I think that it was very undesirable that it should not have been made known in advance. It is possible to imagine great hardship falling on appellants who, all unawares, embark on an expensive appeal foredoomed to failure by reason of a strict though unannounced policy. However, I agree with counsel for the Minister that the failure to publicise the policy is not a ground for questioning the decision. Nor do I find it necessary to decide whether counsel for the applicants can succeed on the last ground in the notice of motion, namely, that the decision was one which no reasonable Minister could have reached. Counsel recognises the obvious difficulties which face him in an attempt to succeed on this last ground.

On the main ground on which this case has been argued, however, I am satisfied that the applicants should succeed. I think that the Minister failed to exercise a proper or indeed any discretion by reason of the fetter which he imposed on its exercise in acting solely in accordance with his stated policy; and further that on



the true construction of the Minister's letter the decision to dismiss the appeal, while purporting to be that of the Minister, was in fact, and improperly, that of the Minister of Agriculture.

*Order accordingly.*

Solicitors: *C A Maddin & Co; Solicitor, Minister of Housing and Local Government.*

G.F.L.B.

### QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, COOKE AND FISHER, JJ)

8th July 1970

BIRKENHEAD AND DISTRICT CO-OPERATIVE SOCIETY LTD v ROBERTS

*Trade Descriptions—Defence—'Mistake'—'Act or default'—Offence due to conduct of employee—Trade Descriptions Act, 1968 s 24 (1) (a).*

By s 24 (1) of the Trade Descriptions Act 1968: 'In any proceedings for an offence under this Act it shall . . . be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake . . . or to the act or default of another person . . .'

HELD: (i) 'mistake' in the sub-section meant a mistake by the person charged, not a mistake by a servant or agent, but, even if that interpretation of the sub-section were wrong, the matter would come under 'act or default' later in the section and the person charged would not, without leave of the court, be entitled to rely on that defence unless he had served on the prosecution the notice required by s 24 (2); (ii) 'act or default' in the sub-section did not apply to any action or omission on the part of a servant or agent of the defendant.

CASE STATED by Wrexham (Denbigh) justices.

The respondent, David Cyril Edward Roberts, preferred an information against the appellants, Birkenhead and District Co-operative Society Ltd, charging them with the commission of an offence under s 1 (1) of the Trade Descriptions Act, 1968, in that they had sold to a customer a joint of meat to which a false trade description was applied.

G Wright for the appellants.

A Scrivener for the respondent.

**FISHER J:** The Birkenhead and District Co-operative Society Ltd were, on the 2nd day of February, 1970, convicted of an offence under s 1 (1) of the Trade Descriptions Act 1968, the charge being that they at their shop in Wrexham in the course of trade as butchers supplied to a Mrs Huntbache a leg of lamb to which a false trade description, namely, 'For roasting English', was applied, the leg of lamb being in fact of New Zealand origin. They appeal against that conviction.

Section 1 (1) of the Act makes it an offence for any person in the course of a trade or business to apply a false trade description to any goods, but that provision is subject to other provisions of the Act. There is no doubt that the appellants did in fact apply a false description to the goods in that there was stuck on the leg of lamb when Mrs Huntbache bought it a label attached to the outer cellophane wrapping bearing the words 'For roasting English' whereas, as the magistrates have found, the lamb was in fact of New Zealand origin. This matter came to the notice of the inspector of weights and measures on 19th May 1969, and in due course he commenced these proceedings against the appellants. The appellants sought to rely on the statutory defence under s 24 of the Act.

That section provides as follows:

'(1) In any proceedings for an offence under this Act it shall, subject to sub-s 2 of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him, or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control. (2) If in any case the defence provided by the last foregoing sub-section involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless, within a period ending seven clear days before the hearing, he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.'

By s 23:

'Where the commission by any person of an offence under this Act is due to the act or default of some other person that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first mentioned person.'

The hearing before the magistrates commenced on the 29th October 1969, and on that day evidence was called for the prosecution. Evidence was then called for the defendants, the witnesses being Mr Packer, the branch manager; Mr Williams, who was in charge of the butchering department, and Mrs Smith, who was Mr Williams' assistant. The facts which the magistrates have found to have been proved were that the duty of cutting up carcasses and seeing to their packing, weighing, and labelling was that of Mr Williams. He would cut up the carcasses, hand the joints to Mrs Smith, and give her instructions as to the labelling of particular meat. It was further found that Mrs Smith would be given in advance booklets containing labels with backs which could be rendered adhesive, the labels containing certain wording, for instance, 'Roasting English' or 'Boiling English', and it would be for her to attach the appropriate label after having first written on it any further matters necessary, in particular, the weight and the price. The magistrates found that on the day in question Mr Williams had been preparing joints of English meat and Mrs Smith had been furnished with labels bearing the words 'For roasting English', that at some point during the day Mr Williams changed over to New Zealand lamb, and that he instructed Mrs Smith accordingly, but that she by inadvertance used on this leg of New Zealand lamb one of the English labels which she had been quite properly using previously for the English meat. It is also found as a fact that the price which she wrote on the label was the correct price for New Zealand meat of the particular weight.

The magistrates found as a fact that the appellants had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence by their staff. At this stage in the proceedings the matter was adjourned so that the magistrates' clerk might consider what advice to give to the magistrates on the legal question whether the defence of mistake was available to the appellants, in other words, whether the word 'mistake' in s 24 (1) (a) extended to a mistake by a servant. The hearing was resumed on 2nd February 1970 when, on the advice of their clerk, the magistrates ruled that the defence of mistake was not available to

the appellants. The appellants' counsel then applied for leave to rely on the alternative defence that the commission of the offence was due to the act or default of Mrs Smith. He asked for leave to do so without having served the seven days' notice on the prosecutor. The magistrates refused leave.

In this court counsel for the appellants has argued two matters—first that the magistrates were wrong in holding that the defence of mistake was not open to the appellant, and, secondly and in the alternative, that they committed an error of law in refusing the appellants leave to raise the defence of 'act or default of another person' without having given the seven days' notice.

In my judgment, the right way to approach the first of those two points is as a matter of construction of s 24 itself. In s 24 1 (a) there are five courses which it is open to a defendant to take, namely, (i) mistake, (ii) reliance on information supplied to him, (iii) the act or default of another person, (iv) an accident, and (v) some other cause beyond his control. As a matter of construction it seems clear to me that Parliament intended that where the matter sought to be raised by way of defence is the act or default of another person it is on those words that the defendant must rely, bringing in as they do the requirement to give seven days' notice under sub-s 2. It would seem to me in the highest degree anomalous that where an act by another person could be said to be a mistake, it should be open to a defendant to rely on it as a mistake thereby avoiding the necessity for giving the notice.

Counsel has argued that what Mrs Smith did was innocent and could not constitute an offence under the Act, and it is, therefore, wrong to refer to it as an act or default which, he submits, when one looks at s 23 must plainly mean a wrongful act or default. But it seems to me, first of all, far from obvious that Mrs Smith's action in applying this wrong label would have been held to be innocent if she had been prosecuted under s 23 of the Act, and the facts had been found as they were found by magistrates in the present case. It would seem to me that plainly she did apply a false trade description and that, even if she were able to say that it was a mistake on her part, it would be difficult for her to satisfy the magistrates that she took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by herself. Secondly, even if that were a matter which was in doubt, it would seem to me wrong that the prosecutor should be denied an opportunity of considering whether or not to bring proceedings against the person directly involved, as would be the case, or might be the case, if the appellants were entitled to rely on her act or default as 'mistake' and thereby be absolved from the necessity of giving notice.

In my judgment, construing s 24 (1) as it stands, the word 'mistake' means a mistake by the person charged, and not a mistake by another person. That would be enough to dispose of the first point, but it seems to me that, still confining oneself to this Act, a finding in the appellants' favour on that point would not help them because, even if the word 'mistake' includes mistake by a servant, the mistake in the present case was clearly also the act of another person. It seems to me that whether it be relied on by way of mistake or whether it be relied on by way of act or default, the case comes within sub-s (2) in that the defence involves the allegation that the commission of the offence was due to the act of another person, and, therefore, notice would have to be given.

I have approached the matter so far only by reference to this statute of 1968. There have been earlier statutes, and there are now in force other statutes, containing similar, though not exactly the same, provisions, and cases have been decided on those other Acts. Reference has been made in particular to the Weights and Measures Act 1963, by s 26 (1) of which it is open to a defendant to prove that the commission of the offence was due to a mistake or to an accident or to some other cause beyond

his control, and that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control. Section 27 (1) provides:

'A person against whom proceedings are brought for an offence under this Part of this Act or any instrument made thereunder shall, upon information duly laid by him and on giving to the prosecutor not less than three clear days' notice of his intention to avail himself of the provisions of this sub-section, be entitled to have brought before the court in those proceedings any other person to whose act or default he alleges that the commission of the offence was due; and if, after the offence has been proved, the original defendant proves that the commission thereof was due to an act or default of that other person— (a) that other person may be convicted of the offence; and (b) if the original defendant further proves that he exercised all due diligence to avoid the commission of the offence by him or any person under his control, the original defendant shall be acquitted of the offence.'

The earlier Act to which reference has been made is the Sale of Foods (Weights & Measures) Act 1926. Section 12 (2) of that Act provides:

'In any proceedings under this Act in respect of an alleged deficiency of weight or measure or number, if the defendant proves to the satisfaction of the court that such deficiency was due to a bona fide mistake or accident, or other causes beyond his control, and in spite of all reasonable precautions being taken and all due diligence exercised by the said defendant to prevent the occurrence of such deficiency, or was due to the action of some person over whom the defendant had no control, the defendant shall be discharged from the prosecution.'

It will be noticed that in those Acts the provision entitling the defendant to rely on mistake, accident, or some other cause beyond his control is not linked in one section with such words as 'reliance on information supplied to him or to the act or default of another person'. They stand by themselves, and the reasoning which I have based on the actual words of s 24 of the Trade Descriptions Act 1968, is not open. None the less, it has been held under the 1926 Act that the word 'mistake' does not extend to the conduct of a servant.

It is sufficient for me to refer to the recent case of *Hall v Farmer* (1), a case under the Weights & Measures Act 1963, in which the earlier case of *Walking v Robinson* (2) is referred to. In *Hall v Farmer*, LORD PARKER, CJ said:

'The first question is whether the respondent surmounted what I may call the first hurdle, that is s 26 (1) (a) of the Weights and Measures Act 1963, by proving that the commission of the offence was due to a mistake or to an accident or to some other cause beyond his control. As I understand it, it was urged that the act or default of Mr. Dunn was such a mistake, accident, or at any rate a cause, outside the control of the respondent. For my part I have always understood that this provision and a similar provision in previous Acts did not cover the act or default of a servant or agent, somebody who was under the control of the principals. Such a person would be a third person for the purposes of what I may call the third party proceedings, which in this Act appear in s 27. The case which is always quoted in this connection is *Walking Ltd. v. Robinson*. There are two passages, the first in the judgment of LORD HEWART, CJ, who in referring to s 12 (2) of what was then the Sale of Food (Weights and Measures)

(1) [1970] 1 All ER 729.

(2) 94 JP 73.

Act 1926, said: "Those words seem to me to have no relation to a case where it is a defect of the machinery or a default of the persons under the defendant's control which is responsible for the mischief." TALBOT, J said: "I entirely agree with the construction which has already been put forward of this sub-section taken in relation to sub-section 5 [dealing with the third party procedure] namely, that this sub-s 2 deals with mistakes, accidents, or causes beyond the control of the employer, not being negligence or other conduct of his servants or persons within his control." It is, of course, true, as counsel for the respondent has said, that the wording of s 12 (2) of that 1926 Act differs somewhat from s 26 (1) of the 1963 Act. But in my judgment the same principle applies here as under the earlier Act, and accordingly it follows that the respondent did not surmount that hurdle.

Counsel for the appellants has argued that *Walkling v Robinson* (1) has been misunderstood, and that in it the court were intending to confine their observations to a case where the servant was guilty of negligence, but it seems to me that the wording was quite wide enough to exclude all cases where the matter sought to be relied on by the defendant was the act of his servant or agent. It has been, as LORD PARKER said in *Hall v Farmer* (2), so understood since 1929, and, in my judgment, rightly so understood. Accordingly, even though the words on which I have placed reliance in the Trade Descriptions Act are not present, it seems to me that for the reasons given in that case the word 'mistake' cannot be construed so as to cover the actions of a servant or agent. That is sufficient to dispose of the first point taken by Mr Wright.

I turn to the second point. The magistrates evidently gave careful consideration to the way in which they should exercise their discretion. Counsel for the respondents concedes that if this court were satisfied that the magistrates had exercised their discretion on a wrong basis in that they had taken into account matters which they should not have taken into account or failed to take into account matters which they should have taken into account, then it would be open to this court to review the exercise of their discretion and to reverse it as being wrong in law. It seems to me that no possible criticism can be addressed to the manner in which the magistrates exercised their discretion. The matters which they had before them and which they took into account were the right matters, and the decision which they came to was one to which they were perfectly entitled to come on the evidence before them, and the case falls far short of one in which this court would intervene. In my judgment the appeal should be dismissed on both grounds.

COOKE J: I agree.

LORD PARKER CJ: I also agree.

*Appeal dismissed.*

Solicitors: *Halsall & Co*, Birkenhead; *Sharpe, Pritchard & Co*, for *W E Bufton*, Ruthin.

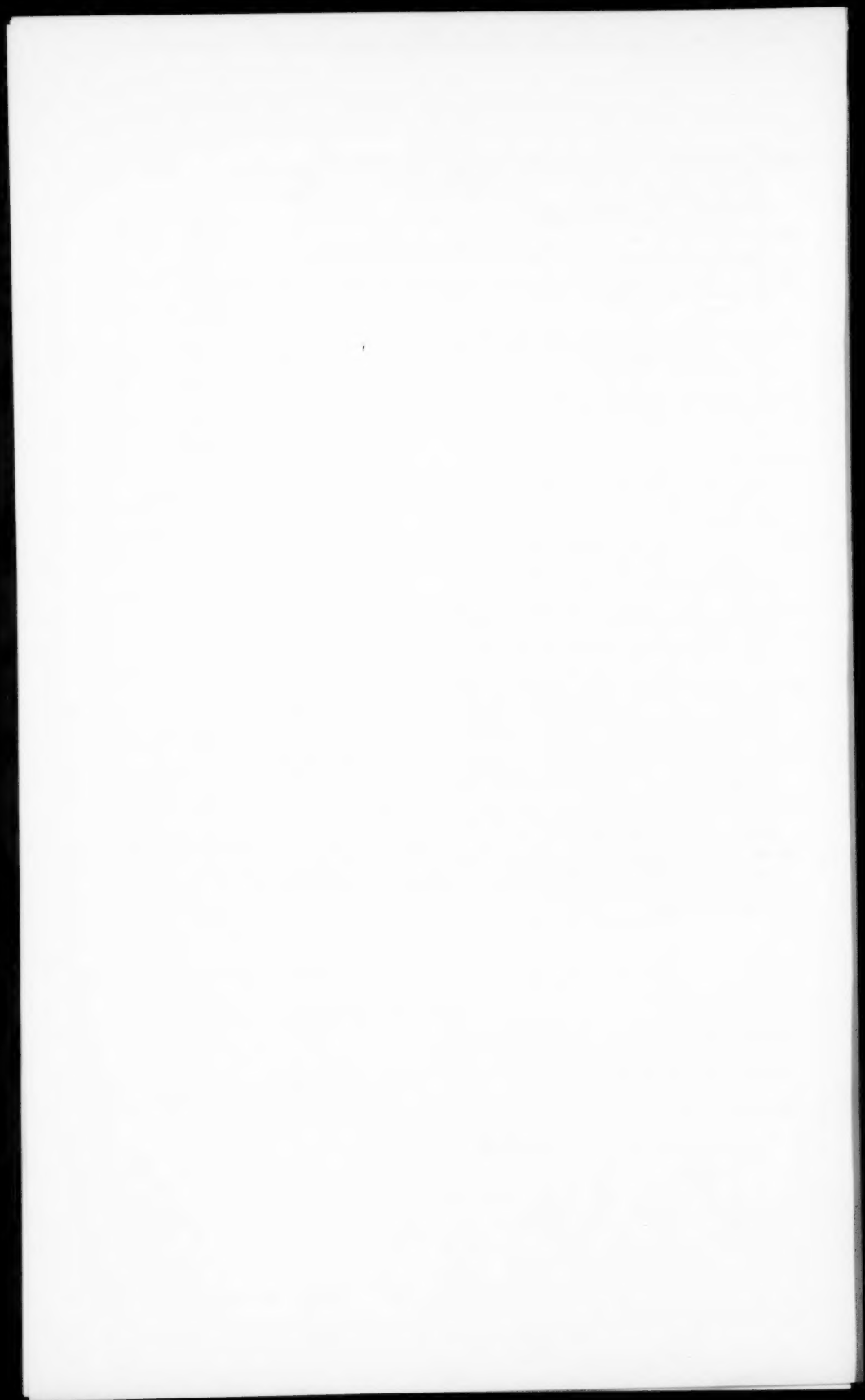
G.F.L.B.

(1) 94 JP 73.

(2) [1970] 1 All ER 729.

<b>RENT CONTROL</b> - Contract referred to tribunal - Entry upon consideration of reference - Papers considered by each member of tribunal individually - Assembly and visit to view premises - No admission obtained - Letter of withdrawal - Not operative till received by tribunal - Rent Act, 1968, s 73 (1).		
<b>R v Tottenham District Rent Tribunal. Ex parte Fryer Bros (Properties) Ltd</b>	QBD	94
<b>ROAD TRAFFIC</b> - Driving test - Duty of examiner appointed by Ministry.		
<b>British School of Motoring Ltd v Simms and Another, Stafford Third Party</b>	Assizes	103
<b>ROAD TRAFFIC</b> - Driving while disqualified - Outstanding offences taken into consideration - Similar offence.		
<b>R v Jones</b>	CA	36
<b>ROAD TRAFFIC</b> - Driving with blood alcohol proportion above prescribed limit - Arrest without warrant - Powers of police to detain thereafter - Road Safety Act, 1967, ss 1, 2 (2), 2 (4), 3 (1), 4.		
<b>R v Mackenzie</b>	Assizes	26
<b>ROAD TRAFFIC</b> - Driving with blood alcohol proportion above prescribed limit - Provision of specimen - Blood - Analysis by ordinary equipment and skill - Gas chromatography.		
<b>Smith v Cole</b>	QBD	97
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Specimen for laboratory test - Failure to supply - Reasonable excuse - Excuse relating to blood specimen only - Liability to supply specimen of urine - Direction to jury - Road Safety Act, 1967, s 3 (3) (6).		
<b>R v Harling</b>	CA	29
<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Assessment - Application of Pointe Gourde principle to cases under Land Compensation Act, 1961, s 6 (1), Sched 1, part 1.		
<b>Wilson v Liverpool City Council</b>	CA	168
<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Reference to Lands Tribunal - Agreement between parties as to basis of assessment - Subsequent decision of House of Lords that that basis wrong - Power of court to remit case to tribunal - Discretion.		
<b>Wilson v Liverpool City Council</b>	CA	168
<b>TOWN AND COUNTRY PLANNING</b> - Permission - Refusal - Appeal to Minister - Decision in accordance with general policy - Need for genuine consideration of particular matter - Town and Country Planning Act, 1962, s 179 (1) (3) (b).		
<b>H Lavender and Son Ltd v Minister of Housing and Local Government</b>	QBD	186
<b>TOWN AND COUNTRY PLANNING</b> - Permission - Refusal - Authority required to purchase land - Compensation - Assessment.		
<b>Margate Corporation v Devotwill Investments Ltd</b>	HL	19
<b>TRADE DESCRIPTIONS</b> - Defence - 'Mistake' - 'Act or default' - Offence due to conduct of employee - Trade Descriptions Act, 1968, s 24 (1) (a).		
<b>Birkenhead and District Co-operative Society Ltd v Roberts</b>	QBD	194
<b>TRADE DESCRIPTIONS</b> - False description - Milk - Foil cap on bottle accurately describing milk and bearing retailer's name - Names of milk suppliers to whom bottle belonged embossed on bottle - Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1).		
<b>Donnelly v Rowlands</b>	QBD	100





COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES, LJ, MILMO AND SHAW, JJ)

20th November 1970

R v WARNER

*Criminal Law—Theft—Ingredients of offence—Intention of permanently depriving another of property—Direction to jury—Theft Act, 1968, s 1 (1), s 6.*

The intention of permanently depriving another of his property is an essential ingredient of the offence of theft under the Theft Act, 1968, just as it was under the common law and former statutes dealing with larceny, and, if there is to be a conviction, a jury must receive a clear direction on the necessity of finding that ingredient proved.

The object of s 6 of the Act is in no case to water down the definition of theft found in s 1 (1), but merely to clarify in certain respects the meaning of the words 'intention of permanently depriving' contained in the definition and to give illustrations of the dishonest intent required.

APPEAL against conviction.

The appellant was convicted at Essex Quarter Sessions on 21st July 1970 of theft and was ordered to be conditionally discharged for three years.

The following statement of facts is taken from the judgment: A Mr Thorne, a service engineer, reached his place of employment, a workshop at the rear of some premises in the High Street, Brentwood, at about nine o'clock one morning. Finding that the workshop was still locked up, he went away to make a purchase, leaving his tools, valued at about £17, in a blue box near the workshop door. He was back within a few minutes, coming down the passageway from the High Street running alongside Messrs Warnes', outfitters shop, next door. According to Mr Thorne, as he came down that passageway he saw the appellant, who was an assistant in the outfitter's shop, approaching from the direction of the workshop door, going towards the back of Warnes' shop, and carrying a blue tool box which looked like Thorne's property. Mr Thorne immediately looked to the place where he had left his tools and found that the box had gone.

The matter was reported to the police and within a short time, which was variously put at 9.45 and 10 o'clock, a police constable went with Mr Thorne to investigate. He saw the appellant, a 30-years-old man who had been employed throughout his working life as a shop assistant and had a perfectly clean character, and he asked him whether he knew anything about the missing tools. He made reply (and this was not challenged): 'No, I don't know what you are talking about.' The constable then spoke to Mr Thorne, who asserted that he had himself seen the appellant carrying his tool box. Thereupon the appellant said: 'Well, all I can say is that he is mistaken.' He was arrested an hour or so later and taken to the police station. He was there told that the police were going back to make a search, and he then repeated that he did not take the tools and that Thorne was mistaken.

The police did not take long to find the tools. They were in a cardboard box under some scarves in a small room at the rear of Warnes' shop. When they showed them to the appellant at the police station and he was told where they had been recovered from, he said: 'Yes, I took the tools and panicked.' Those words to a degree adumbrated what he was going to say later at his trial. He then made his written statement recounting the bare facts of seeing the tools and taking and hiding them, but still providing no explanation for his actions.

At his trial he for the first time gave some sort of an explanation. It emerged that there had been unpleasantness between the people employed in the workshop and those employed in Warnes the outfitters. A dispute about a right-of-way

was being handled by solicitors, and there was a suggestion that shortly before the alleged offence the appellant had been hemmed in, when in his friend's car, by a lorry outside the workshop, which the men employed there had refused to move. The appellant testified that he took the tools by way of getting his own back for having been thus inconvenienced by the workshop employees, that he had previously seen boxes of tools lying about in the yard, and that he would probably have kept Thorne's tool box for an hour and then returned it to the place where he had found it. He said that he had initially put the box down by the door of the shop premises, but when the police arrived he had panicked, and, being panic-stricken, he then put the tool box under the scarves, hoping that the police would go away and so enable him to return the tools without being detected.

*B S Green* for the appellant.

*J Turner* for the Crown.

**EDMUND DAVIES LJ:** What should have been, as it was originally presented, a straightforward and simple little case of theft has become one not without some interest.

On 21st July 1970 at Essex Quarter Sessions the appellant was convicted of theft and was discharged conditionally for three years. His appeal against that conviction is brought with the leave of the single judge, who was disturbed by a certain direction in law given by the chairman to which reference must be made. The one point involved in the appeal is whether the Crown established that the appellant intended permanently to deprive the owner of certain goods which he unquestionably took. That was also the sole issue at the trial, and a direction to the jury in homely language regarding the effect of s 1 (1) of the Theft Act 1968, was all that was called for from the chairman. But the matter became elaborated in such a way that we have come to the conclusion that there is no alternative but to allow this appeal.

There was a clear issue whether the appellant had or did not have the necessary criminal intention of permanently depriving Mr Thorne of his tools. It was the only issue which counsel on both sides desired to have left to the jury. But the chairman unfortunately did not leave it in that clear way. Instead, there came a stage when he referred to s 6 of the Theft Act. Counsel for the Crown made it quite clear that in his view s 6 had no bearing upon the case. Reference to it was certainly not calculated to enlighten the jury in the discharge of their task.

The Theft Act 1968 aspired to remove legal subtleties devoid of merit. Although it makes new law in certain respects, nowhere does it abandon the basic conception both of the common law and of earlier legislation that there can be no theft without the intention of permanently depriving another of his property. Section 1 (1) declares that intention to be an essential ingredient, and nothing to be found elsewhere in the Act justifies a conviction for theft in its absence.

The chairman began with a direction which was both clear and correct, saying:

"There is one big question of fact for you and it is this: Did the defendant, who undoubtedly did what the Crown witnesses say he did and what he himself admits he did, do it dishonestly with the intention of permanently depriving the owner of his property?"

But unfortunately his direction later became confused by his references to s 6, the object of which he may himself have misunderstood. There is no statutory definition of the words 'intention of permanently depriving', but s 6 seeks to clarify their meaning in certain respects. Its object is in no wise to cut down the definition of 'theft' contained in s 1. It is always dangerous to paraphrase a statutory enactment,

but its apparent aim is to prevent specious pleas of a kind which have succeeded in the past by providing, in effect, that it is no excuse for an accused person to plead absence of the necessary intention if it is clear that he appropriated another's property intending to treat it as his own, regardless of the owner's rights. Section 6 gives illustrations, as it were, of what can amount to the dishonest intention demanded by s 1 (1). But it is a misconception to interpret it as watering down s 1.

The first passage in the summing-up which may well have confused the jury in this regard was in the following terms:

'So far as "appropriating property belonging to another" is concerned, you have got to be satisfied that he had the intention of permanently depriving the other of it, and there are indications in the statute that "permanently depriving the other of it" may be "indefinitely" depriving the other of it, because who shall say when something has become permanent rather than indefinite? The justification for such an approach to s 1 is to be found in s 6 of the same Act.'

As he felt that the jury might well be at a loss to follow exactly what the chairman meant by these words, at the end of the summing-up defence counsel (having been invited by the court to do so) rightly took the matter up. I quote again from the transcript:

'Mr. Green: "The first point I would like to make clear is one of fact. The point is that the defendant says he intended to put the tool box back." The Chairman: "Yes, well, I would have probably kept it an hour and returned it to him." I read that out.' Mr. Green: "I invite you to tell the jury that it would be a complete defence if they accepted it." The Chairman: "Yes. I said that is what the Crown have to prove, that he took the tool box dishonestly with the intention of permanently depriving the owner of it. If they fail to prove that, he is entitled to be acquitted." Mr. Green: "There is one further point. When you were discussing the intention, you did make some remarks about 'indefinitely'. I would be grateful if you could tell the jury merely that, if he intended to give it back, that would be a complete defence." The Chairman: "Yes, but the only question is when. That is why I referred to s 6, because if it is his intention to treat the thing as his own, to dispose of it, regardless of the owner's rights, and if you dispose of them by putting them in a box covered with scarves so that the other man loses the use of his tools indefinitely, it seems that there is no difference between that and 'permanently'." Mr. Green: "I respectfully accept that, provided the jury understand completely that if he intended to give it back, in simple language, that would be a complete defence." The Chairman: "Yes, but whether somebody intends to give a thing back must depend in the jury's mind on how he dealt with the thing, not merely what he says. It does not say: 'Anyway, he is all right as long as he says he will give it back.' The jury judges his intention by what he says and what he does. What people do at the time is usually more reliable than what they say at a later time. That is what I said, and I do not propose to take any of that back.'"

We think we understand what the chairman had in mind to convey, though whether the jury did is another and more important matter. Even so, we are troubled by the use made by the chairman of s 6 and particularly of his interpretation of the word 'dispose' in the phrase 'if his intention is to treat the thing as his own to dispose of regardless of the other's rights' in sub-s (1) thereof. The real mischief, as it seems to us, lies in the following passage:

'If you dispose of them' [that is, the tools which were the subject-matter of the charge] 'by putting them in a box covered with scarves so that the other man loses the use of his tools indefinitely, it seems that there is no difference between that and "permanently".'

To imply that putting the tools in a box of itself indicated an intention to keep them indefinitely begs the essential question in the case. One of the basic issues at the trial was when and why they were put into the box, the defence evidence being that this was not done until after the police arrived on the scene and that it was then done purely out of panic.

What does not, we think, clearly emerge from the passage just quoted is that the essential question was whether the accused man had ever formed the intention to deprive the owner indefinitely of the use of his tools. If he had, then he could in certain circumstances be regarded as intending to treat the thing as his own to dispose of, regardless of the other's rights, within the meaning of s 6 (1). But if this was not so, if, for example, his intention was to deprive the owner of the use of his goods for a limited period the precise length of which he had not yet decided upon, but fully intending to return them to their owner in due course, this would not necessarily justify conviction for theft and in the majority of cases probably would not do so. This, we think, is clearly brought out by the second part of s 6 (1), which, harking back to the earlier words, continues: '... a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal'. We do not think that this essential point was made clear to the jury.

It was, as we have already said, in essence an uncomplicated case which posed a simple question. The reference to s 6 was both unnecessary, and, we think, unlikely to have been helpful to the jury. The introduction by the chairman of the word 'indefinitely' clouded the picture by needlessly introducing a complex consideration. As MILMO J said in the course of counsel's submissions, it may well be that the jury disbelieved the appellant's evidence that he intended to replace the tools 'in about an hour', but that, having regard to the chairman's use of the word 'indefinitely', they may have concluded therefrom that if, for example, he intended to keep the tools for a longer period than that stated, that in itself could suffice to justify a conviction for theft. We just do not know. It is true that the jury were supplied with six copies of the Theft Act. But even if they read s 6 for themselves, they might well (having regard to the direction) have misunderstood it. In the result the summing-up lacked clarity upon a point cardinal in character.

But counsel for the Crown, who in no degree contributed to such confusion as we think may have resulted, has nevertheless submitted that, so clear and cogent was the evidence (particularly having regard to the absence of any indication by the accused of his ever having intended to return the tools until the moment when he went into the witness-box), we should say that no miscarriage of justice resulted from the confused direction of the learned judge. But as the basis upon which the jury proceeded must be regarded as speculative, we cannot think that justice would be attained by applying the proviso to s 2 (1) of the Criminal Appeal Act 1968 to uphold this conviction. In the result, this appeal must be allowed and the conviction quashed.

*Conviction quashed.*

Solicitors: Landons, Brentwood; T Hambrey Jones, Chelmsford.

T.R.F.B.

### HOUSE OF LORDS

(LORD REID, LORD UPJOHN, LORD MORRIS OF BORTH-Y-GEST, LORD WILBERFORCE AND LORD DIPLOCK)

14th, 15th December 1970, 4th February 1971

KENNEDY v SPRATT

*Criminal Law—Sentence—Suspension—Act providing minimum sentences for specified offences—Power of court to suspend sentence—Criminal Justice (Temporary Provisions) (Northern Ireland) Act, 1970, s 1—Treatment of Offenders (Northern Ireland) Act, 1968, s 18 (1).*

*Statute—Construction—Purposive interpretation—Act providing minimum sentences for specified criminal offences.*

By s 1 (1) of the Criminal Justice (Temporary Provisions) (Northern Ireland) Act, 1970, it was enacted that any person who was convicted of an offence committed during the state of Emergency, due to civil disturbances in Northern Ireland, which had been proclaimed on 30th June, 1970, under any of the statutory provisions mentioned in the schedule to the Act should be sentenced to imprisonment for not less than the period specified opposite that provision in the schedule. By s 18 (1) of the Treatment of Offenders (Northern Ireland) Act, 1968, a court which passed a sentence of imprisonment for a term of not more than two years might order that the sentence should not take effect unless the offender committed another offence.

HELD by LORD REID, LORD UPJOHN, and LORD DIPLOCK (LORD MORRIS OF BORTH-Y-GEST and LORD WILBERFORCE dissenting) that a statute must be construed in the light of what was common knowledge when it was enacted and the mischief it was designed to prevent, in this case the extensive and violent disturbances which had been taking place in Northern Ireland and the likelihood of further disturbances, and, applying this principle of interpretation to the Act of 1970, and on its general construction, in a case which fell within the Act of 1970 the court had no power, under s 18 (1) of the Act of 1968, to suspend the sentence passed in accordance with the Act of 1970.

APPEAL by Philip Kennedy from an order of the Court of Appeal in Northern Ireland dismissing his appeal against a sentence of six months' imprisonment passed on him by the resident magistrate at Limavady Petty Sessions, co Londonderry, after he had pleaded guilty to a charge of an offence mentioned in the schedule to the Criminal Justice (Temporary Provisions) (Northern Ireland) Act 1970.

J F B Russell QC and G P H Gibson (both of the Northern Ireland Bar) for the appellant.

The Attorney-General for Northern Ireland (J W B Kelly QC), J B E Hutton QC and R D Carswell (both of the Northern Ireland Bar) for the respondent.

Their Lordships took time for consideration.

4th February. The following opinions were delivered.

**LORD REID:** The appellant, a man aged about 25, pleaded guilty at Limavady Petty Sessions to a charge of disorderly behaviour on a road on 9th July 1970. It is not disputed that he committed this offence in a fit of temper after a domestic quarrel, no political or sectarian element being involved.

On 1st July 1970, the Criminal Justice (Temporary Provisions) Act (Northern Ireland) 1970 was enacted. Section 1 provides:

'(1) Subject to subsection (3), any person who is convicted of an offence, committed during the period of the present emergency, under any of the



statutory provisions mentioned in column 1 of the schedule shall, notwithstanding anything to the contrary contained in that or in any other statutory provision, be sentenced to imprisonment for not less than the period specified opposite that provision in column 2 of the schedule.

(2) For the purposes of subsection (1) "period of the present emergency" means the period beginning with the 30th day of June 1970 and ending with such day as the governor may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end.

(3) Nothing in this section shall prejudice or affect any power of pardoning or reprieving offenders or remitting sentences which is exercisable under or by virtue of the Royal Prerogative.'

The appellant was guilty of an offence under s 9 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968, and with regard to that section the schedule to the 1970 Act provides:

'Minimum sentence to be imposed . . . Six months in the case of a person convicted of riotous or disorderly behaviour in . . . any street, road, highway or other public place.'

The appellant was accordingly sentenced by the resident magistrate to a term of six months' imprisonment. The question then arose whether the magistrate had power under s 18 of the Treatment of Offenders Act (Northern Ireland) 1968 to order a suspended sentence. He held that the 1970 Act prevented him from making such an order, and the appellant then appealed by way of Case Stated to the Court of Appeal in Northern Ireland. On 13th October 1970, that court held that the magistrate had no such power. The appellant then obtained leave to appeal to this House. The relevant part of s 18 (1) of the 1968 Act is as follows:

'A court which passes a sentence of imprisonment for a term of not more than two years or makes an order for detention in a young offenders centre for a like term for an offence may order that the sentence or order for detention shall not take effect unless, during the period specified in the order, being not less than one year or more than three years from the date of the order, the offender commits in Northern Ireland another offence for which the court has power, or would, but for section 1, have power to sentence him to imprisonment, and thereafter a court having power to do so orders under section 19 that the original sentence or order for detention shall take effect . . .'

The argument for the appellant is short and simple. Section 18 of the 1968 Act only comes into operation after a sentence has been passed. It enables the court to order that the sentence 'shall not take effect', unless the accused commits another offence. But the sentence is neither altered nor superseded by such an order. The 1970 Act only deals with sentences. In cases to which it applies it limits the power of the court to determine what sentence shall be passed, but it does not purport to limit the existing powers of the court with regard to any other matter. There is nothing in the 1970 Act which expressly or by implication prevents the court from applying the provisions of s 18 of the 1968 Act. There is nothing inconsistent in limiting the power of the court to pass sentence but leaving the court free to suspend the sentence once it has been passed.

If one could stop there I think that this would be a valid argument. But every statute must be construed in light of what was common knowledge when it was enacted, or, as it is sometimes put, in light of the mischief which it was designed to prevent. It was common knowledge in Northern Ireland on 1st July 1970, that there

had been in the recent past extensive and violent disturbances and that there was a likelihood of further disturbances of such extent and intensity as might imperil the stability of society. Moreover, we were informed by the learned Attorney-General that there had been much public criticism of lack of uniformity between various courts in sentencing those involved in the earlier disturbances. The 1970 Act is obviously designed to avoid that and to provide a stern deterrent against further outbreaks. Its provisions are not limited to cases connected with such disturbances and it must have been obvious to the legislature that they would give rise to cases of great hardship as in the present case. But the Act expressly saves the royal prerogative in s 1 (3) as a means whereby the severity can be mitigated in appropriate cases. It may well have been thought that in the circumstances it was necessary to proceed in this way.

Before the 1970 Act was passed the courts had a wide choice in dealing with offenders. There could be discharge, absolute or conditional, probation, fine or imprisonment for such term as was thought appropriate. Admittedly the 1970 Act where it applies prevents the court from adopting any of the alternatives to imprisonment and prevents any term of imprisonment less than the specified minimum. I find it incredible that anyone who thought it necessary to go so far could have intended to leave to the courts the power to suspend the sentence. The effect of a suspended sentence is that the offender goes free and unpunished unless he is found guilty of another offence and even then s 19 of the 1968 Act entitles the court to reduce the suspended sentence or to make no order with regard to it.

There is no guidance in the statute as to how the court is to act in deciding whether or not to suspend a sentence of imprisonment. If in a case to which the 1970 Act applies the court would, but for that Act, have imposed a much lighter penalty, how is it to act in deciding whether to suspend the sentence which the Act requires? In effect it must often have to choose between too heavy and too light a penalty. If one reason for the 1970 Act was to achieve uniformity that purpose will certainly not be achieved. Some courts will suspend too many minimum sentences, some too few. But then it is said that while the 1970 Act was being drafted and passed through Parliament surely someone must have seen that the matter of suspended sentences should be provided for. That would be a more powerful argument were it not for the fact that the Act also fails to deal with the position of children and young persons who are convicted of one of the specified offences. On any view one effect of the 1970 Act is that any child or young person so convicted must be sentenced to the specified minimum term of imprisonment. So these cases can only be dealt with by the royal prerogative or perhaps by some administrative action.

Although I may be convinced that the legislature must have intended to take away the power of the courts to suspend sentences in these cases, that is not sufficient unless on a fair construction it is possible to construe the 1970 Act as a whole as having that effect. I find this the most difficult question in the case. We are as always trying to find the intention of the legislature. Where, taking into account the surrounding circumstances and the likely consequences of the various possible constructions, there can be any doubt at all about that intention, we must where penalties are involved require that the intention shall clearly appear from the words of the enactment construed in light of those matters. But if we can say that those matters show that a particular result must certainly have been intended, we would, I think, be stultifying the underlying principle if we required more than that the statutory provisions are reasonably capable of an interpretation carrying out that intention.

I think that the best specific indication is to be found in s 1 (3) of the 1970 Act. This contains an unusual saving of the royal prerogative and the fact that it was

thought necessary to insert this subsection appears to me to show that this was intended to be the only way of releasing the convicted person from serving the whole or any part of the minimum sentence. The long title to the Act is 'An Act to provide for the imposition of minimum sentences . . .' The word 'imposition' here seems to me to indicate that the sentence is to be effective. And the whole tenor of the Act appears to me to be inconsistent with a power in the court to prevent the sentence from being served. The Act must be read by itself for it does not follow that words or phrases in it are to have the same meaning as they have in other Acts. I think that LORD MACDERMOTT CJ was right in saying that 'the words "be sentenced to imprisonment" can, in my opinion, mean in the context of the 1970 Act nothing less than "be sent to prison"'. I would, therefore, dismiss this appeal.

My Lords, before his death my noble and learned friend **Lord Upjohn** had prepared a speech with which I agree, and it is in accord with precedent that I adopt it and read it as part of my own speech. He too would have dismissed the appeal. It is as follows:

On 28th July 1970, the appellant was charged before a magistrate with disorderly behaviour in a road contrary to s 9 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968 ('the 1968 Act') as amended by the Criminal Justice (Temporary Provisions) Act (Northern Ireland) 1970 ('the 1970 Act'). The appellant through his solicitor pleaded guilty to the charge, but submitted that as the prosecution conceded that there was no sectarian or political element or significance in the offence, which was committed by the appellant in a fit of temper after an argument with a girl, the magistrate should consider suspending the sentence of six months' imprisonment (which the 1970 Act required) under s 18 of the Treatment of Offenders Act (Northern Ireland) 1968 ('the Offenders Act'). The magistrate considered that he had no power under s 18 to suspend the sentence of six months prescribed by the 1970 Act and that is the question that your Lordships have to decide. The appellant appealed to the Court of Appeal in Northern Ireland who upheld the magistrate's decision, the judgment of the court being delivered by LORD MACDERMOTT CJ.

I find the judgment of LORD MACDERMOTT CJ most convincing and I should be happy merely to state my concurrence therewith, but in view of the differing views expressed in your Lordships' House I propose to express my own reasons for agreeing with LORD MACDERMOTT.

Until the enactment of the 1970 Act it is not in doubt that a magistrate convicting an offender of an offence under s 9 of the 1968 Act had to consider a number of courses of action and to select that which he considered appropriate to the offender before him. Under the express terms of s 9 it was enacted that the offender who was guilty of an offence should be liable 'to imprisonment for a term not exceeding six months or to a fine not exceeding £100, or to both'. But under s 18 of the Offenders Act, he could exercise powers described in the following terms:

'A court which passes a sentence of imprisonment for a term of not more than two years . . . may order that the sentence . . . shall not take effect . . .'

unless the offender should commit another offence within a prescribed period; in other words, he might suspend the sentence. But, of course, there were other ways of dealing with the offender such as, for example, by granting an absolute or conditional discharge or making a probation order or imposing a fine.

Then came the 1970 Act, passed as its long title makes clear,

'to provide for the imposition of minimum sentences of imprisonment on persons convicted of certain offences committed during the period of the present emergency.'

The long title did not make clear at what type of offence the Act was aimed, but in my opinion an examination of this short Act, and in particular of the schedule thereto, explains that and makes it quite clear, as I shall show in a moment. Section 1 (1) is in these terms:

'Subject to subsection (3), any person who is convicted of an offence, committed during the period of the present emergency, under any of the statutory provisions mentioned in column 1 of the schedule shall, notwithstanding anything to the contrary contained in that or in any other statutory provision, be sentenced to imprisonment for not less than the period specified opposite that provision in column 2 of the schedule.'

Section 1 (2) defines the period of the emergency and s 1 (3) is in these terms:

'Nothing in this section shall prejudice or affect any power of pardoning or reprieving offenders or remitting sentences which is exercisable under or by virtue of the Royal Prerogative.'

One is entitled to take into account common general knowledge of the state of affairs in Northern Ireland in July 1970, when the Act was passed; it was in a state of sporadic but serious civil disorder, which had led to the 'emergency' referred to in the Act. The schedule to the Act makes it clear that it was aimed at the discouragement of what one may briefly describe as crimes relating to this state of civil disorder by imposing severe terms of imprisonment for such crimes as rioting or disorderly conduct in public places, using offensive and dangerous weapons, and so on. It is noteworthy that the draftsman of the 1970 Act was careful in regard to s 9 of the 1968 Act to include only offences committed in a public place and not to include offences which might be committed merely in places to which the public has access or premises where intoxicating liquor is sold, or merely offences of indecency. In my opinion, it is quite clear that the intention of the Parliament of Northern Ireland in this enactment was to discourage such acts in the future by imposing substantial terms of imprisonment (by which I mean sentencing offenders to jail) for these offences and so to keep such offenders off the streets for a time, and withdrawing all discretion as to the term of imprisonment or the imposition of other penalties from the judiciary concerned.

The question for your Lordships is whether the 1970 Act has by its terms achieved what, in my opinion, is this plain intention. The argument is that in s 1 (1) the words 'shall . . . be sentenced to imprisonment' mean no more than that the court shall pass a sentence of imprisonment, or, even to use the word used in the schedule, 'impose' a sentence of imprisonment. As LORD PARKER CJ in *R v O'Keefe* (1) pointed out, the sentence of a term of imprisonment followed by its suspension remains a sentence of imprisonment. If that is the meaning of the section then the operation of s 18 of the Offenders Act is left unimpaired, although it becomes obligatory by the terms of the 1970 Act to pass a sentence of six months which, as it so happens, is the maximum sentence which can be imposed under s 9 of the 1968 Act.

If the matter rested there the result would seem curious and scarcely what the draftsman can have intended, for it would hardly have affected the powers of the court in respect of that section; but the general principle that a penal provision ought to be given that interpretation which is the least unfavourable to the accused could validly be invoked. But the consequences of the 1970 Act are admittedly much wider, for counsel for the appellant has rightly felt bound to concede that all the other powers of the court in dealing with the offender otherwise than by a term of

(1) 133 JP 160; [1969] 1 All ER 426; [1969] 2 QB 29.

thought necessary to insert this subsection appears to me to show that this was intended to be the only way of releasing the convicted person from serving the whole or any part of the minimum sentence. The long title to the Act is 'An Act to provide for the imposition of minimum sentences . . .' The word 'imposition' here seems to me to indicate that the sentence is to be effective. And the whole tenor of the Act appears to me to be inconsistent with a power in the court to prevent the sentence from being served. The Act must be read by itself for it does not follow that words or phrases in it are to have the same meaning as they have in other Acts. I think that LORD MACDERMOTT CJ was right in saying that 'the words "be sentenced to imprisonment" can, in my opinion, mean in the context of the 1970 Act nothing less than "be sent to prison"'. I would, therefore, dismiss this appeal.

My Lords, before his death my noble and learned friend **Lord Upjohn** had prepared a speech with which I agree, and it is in accord with precedent that I adopt it and read it as part of my own speech. He too would have dismissed the appeal. It is as follows:

On 28th July 1970, the appellant was charged before a magistrate with disorderly behaviour in a road contrary to s 9 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968 ('the 1968 Act') as amended by the Criminal Justice (Temporary Provisions) Act (Northern Ireland) 1970 ('the 1970 Act'). The appellant through his solicitor pleaded guilty to the charge, but submitted that as the prosecution conceded that there was no sectarian or political element or significance in the offence, which was committed by the appellant in a fit of temper after an argument with a girl, the magistrate should consider suspending the sentence of six months' imprisonment (which the 1970 Act required) under s 18 of the Treatment of Offenders Act (Northern Ireland) 1968 ('the Offenders Act'). The magistrate considered that he had no power under s 18 to suspend the sentence of six months prescribed by the 1970 Act and that is the question that your Lordships have to decide. The appellant appealed to the Court of Appeal in Northern Ireland who upheld the magistrate's decision, the judgment of the court being delivered by LORD MACDERMOTT CJ.

I find the judgment of LORD MACDERMOTT CJ most convincing and I should be happy merely to state my concurrence therewith, but in view of the differing views expressed in your Lordships' House I propose to express my own reasons for agreeing with LORD MACDERMOTT.

Until the enactment of the 1970 Act it is not in doubt that a magistrate convicting an offender of an offence under s 9 of the 1968 Act had to consider a number of courses of action and to select that which he considered appropriate to the offender before him. Under the express terms of s 9 it was enacted that the offender who was guilty of an offence should be liable 'to imprisonment for a term not exceeding six months or to a fine not exceeding £100, or to both'. But under s 18 of the Offenders Act, he could exercise powers described in the following terms:

'A court which passes a sentence of imprisonment for a term of not more than two years . . . may order that the sentence . . . shall not take effect . . .'

unless the offender should commit another offence within a prescribed period; in other words, he might suspend the sentence. But, of course, there were other ways of dealing with the offender such as, for example, by granting an absolute or conditional discharge or making a probation order or imposing a fine.

Then came the 1970 Act, passed as its long title makes clear,

'to provide for the imposition of minimum sentences of imprisonment on persons convicted of certain offences committed during the period of the present emergency.'



The long title did not make clear at what type of offence the Act was aimed, but in my opinion an examination of this short Act, and in particular of the schedule thereto, explains that and makes it quite clear, as I shall show in a moment. Section 1 (1) is in these terms:

'Subject to subsection (3), any person who is convicted of an offence, committed during the period of the present emergency, under any of the statutory provisions mentioned in column 1 of the schedule shall, notwithstanding anything to the contrary contained in that or in any other statutory provision, be sentenced to imprisonment for not less than the period specified opposite that provision in column 2 of the schedule.'

Section 1 (2) defines the period of the emergency and s 1 (3) is in these terms:

'Nothing in this section shall prejudice or affect any power of pardoning or relieving offenders or remitting sentences which is exercisable under or by virtue of the Royal Prerogative.'

One is entitled to take into account common general knowledge of the state of affairs in Northern Ireland in July 1970, when the Act was passed; it was in a state of sporadic but serious civil disorder, which had led to the 'emergency' referred to in the Act. The schedule to the Act makes it clear that it was aimed at the discouragement of what one may briefly describe as crimes relating to this state of civil disorder by imposing severe terms of imprisonment for such crimes as rioting or disorderly conduct in public places, using offensive and dangerous weapons, and so on. It is noteworthy that the draftsman of the 1970 Act was careful in regard to s 9 of the 1968 Act to include only offences committed in a public place and not to include offences which might be committed merely in places to which the public has access or premises where intoxicating liquor is sold, or merely offences of indecency. In my opinion, it is quite clear that the intention of the Parliament of Northern Ireland in this enactment was to discourage such acts in the future by imposing substantial terms of imprisonment (by which I mean sentencing offenders to jail) for these offences and so to keep such offenders off the streets for a time, and withdrawing all discretion as to the term of imprisonment or the imposition of other penalties from the judiciary concerned.

The question for your Lordships is whether the 1970 Act has by its terms achieved what, in my opinion, is this plain intention. The argument is that in s 1 (1) the words 'shall . . . be sentenced to imprisonment' mean no more than that the court shall pass a sentence of imprisonment, or, even to use the word used in the schedule, 'impose' a sentence of imprisonment. As LORD PARKER CJ in *R v O'Keefe* (1) pointed out, the sentence of a term of imprisonment followed by its suspension remains a sentence of imprisonment. If that is the meaning of the section then the operation of s 18 of the Offenders Act is left unimpaired, although it becomes obligatory by the terms of the 1970 Act to pass a sentence of six months which, as it so happens, is the maximum sentence which can be imposed under s 9 of the 1968 Act.

If the matter rested there the result would seem curious and scarcely what the draftsman can have intended, for it would hardly have affected the powers of the court in respect of that section; but the general principle that a penal provision ought to be given that interpretation which is the least unfavourable to the accused could validly be invoked. But the consequences of the 1970 Act are admittedly much wider, for counsel for the appellant has rightly felt bound to concede that all the other powers of the court in dealing with the offender otherwise than by a term of

(1) 133 JP 160; [1969] 1 All ER 426; [1969] 2 QB 29.



imprisonment, suspended or not, which I have already mentioned are swept away by the Act during the continuance of the emergency. I cannot believe that, if the Act sweeps away all these other remedies which might be much more appropriate in some cases than the imposition of a suspended term of imprisonment, Parliament intended that this discretion alone should remain. That would seem to be quite contrary to the intention of the Act which was to give, in the words of LORD MACDERMOTT CJ, a 'sharp term of imprisonment'; a jail sentence without any power of suspension. Furthermore, I think s 1 (3) of the 1970 Act gives some support to this view. It recognised that there would be some cases of hardship by the obligatory imposition of a jail sentence in this severe Act but they could properly be dealt with by the exercise of the royal prerogative.

For these reasons and for those given by LORD MACDERMOTT CJ I would dismiss this appeal.

**LORD MORRIS OF BORTH-Y-GEST:** On 9th July 1970 the appellant was guilty of some disorderly behaviour. It happened in a road at Limavady in the county of Londonderry. He had an argument with a girl. He lost his temper. The disorderly behaviour resulted. It had no sectarian element about it. There was no sort of political significance in it. As a manifestation of human frailty it hardly seemed destined to attract public notice. Though an offence had been committed it was not of a nature that would be likely to make much demand on the time of a court of summary jurisdiction. Those who preside in such courts have a wealth of experience in assessing the measure of men's minor errors or indiscretions and in deciding whether or not public interest requires that there should be any, and, if so, what penalty.

The appellant's conduct came within the wording of s 9 (1) of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968, which is as follows:

'Any person guilty of any riotous, disorderly or indecent behaviour, or of any behaviour whereby a breach of the peace is likely to be occasioned, in any street, road, highway or other public place, or in any place to which the public have access (whether as of right or by permission and whether subject to or free of charge), or on any premises where intoxicating liquor is sold, shall be guilty of an offence and shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding £100, or to both.'

On 16th July 1970, the appellant was summoned to appear on 28th July before the magistrates' court in the petty sessional district of Limavady to answer a complaint of having been guilty of disorderly behaviour in a road. There was no complaint of riotous behaviour; nor of indecent behaviour; nor of behaviour whereby a breach of the peace was likely to be occasioned. The appellant duly appeared and by pleading guilty he acknowledged that he had been guilty of disorderly behaviour in a road.

The Act above referred to was passed and came into operation on 12th December 1968. On the same day the Treatment of Offenders Act (Northern Ireland) 1968 was passed and came into operation. Part I of the latter Act contained provisions with regard to sentences on and detention of young offenders. In Part II there are further provisions with respect to the treatment of offenders and such provisions enable a court to make an order that in certain cases a sentence of imprisonment which is passed shall not take effect. Sections 18 to 21 relate to suspended sentences of imprisonment.

It is beyond doubt that if in the period after 12th December 1968, and before 1st July 1970, there had been a conviction for disorderly behaviour in a road and if the court had considered it necessary to pass a sentence of imprisonment (for a term

of not more than six months) it would have been open to the court to make an order (on terms permitted by the Act) that the sentence of imprisonment should not then take effect. If the appellant's argument with a girl and his loss of temper had happened some ten days earlier than it did no problem would have arisen. He might have suffered no penalty. He might have been fined. Had the passing of a sentence of imprisonment been contemplated it could have been ordered that (subject to conditions) it should not then take effect.

The period beginning on 30th June 1970 became however a period of emergency. Certain changes in the law were enacted by the Criminal Justice (Temporary Provisions) Act (Northern Ireland) 1970 which was passed on 1st July 1970. It was an Act—

'to provide for the imposition of minimum sentences of imprisonment on persons convicted of certain offences committed during the period of the present emergency; and for related purposes.'

Section 1 is in the following terms:

'(1) Subject to subsection (3), any person who is convicted of an offence, committed during the period of the present emergency, under any of the statutory provisions mentioned in column 1 of the schedule shall, notwithstanding anything to the contrary contained in that or in any other statutory provision, be sentenced to imprisonment for not less than the period specified opposite that provision in column 2 of the schedule.

'(2) For the purposes of subsection (1) "period of the present emergency" means the period beginning with the 30th day of June 1970 and ending with such day as the governor may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end.

'(3) Nothing in this section shall prejudice or affect any power of pardoning or reprieving offenders or remitting sentences which is exercisable under or by virtue of the Royal Prerogative.'

In col 1 of the schedule certain sections of ten Acts of Parliament are set out. Column 2 is headed 'Minimum sentence to be imposed therefor'. In col 2 and opposite to the mention in col 1 of s 9 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968 are the words:

'Six months in the case of a person convicted of riotous or disorderly behaviour in, or of any behaviour whereby a breach of the peace is likely to be occasioned in, any street, road, highway or other public place.'

As a result of that enactment it became the duty of the court on 28th July, whatever course it might otherwise have been disposed to follow, to comply with s 1. When the appellant by acknowledging his guilt was convicted of the offence of disorderly behaviour in a road he had to be sentenced to imprisonment for not less than six months. That was the 'minimum sentence to be imposed'. Then arose the question whether the sentence should be suspended under the power given by s 18 of the Treatment of Offenders Act (Northern Ireland) 1968. The resident magistrate was of the opinion that he lacked that power. Accordingly his decision went beyond the passing or the imposing of the minimum sentence. The appellant was ordered 'to be imprisoned' for the period of six months. The magistrate on the application of the appellant stated a case for the opinion of the Court of Appeal on a point of law. He defined the question as being

'whether or not I have power to suspend a sentence of six months imprisonment imposed for the said offence under s 18 of the Treatment of Offenders Act (Northern Ireland), 1968, and I consider that the circumstances of the case and any mitigating factors in relation thereto would render it appropriate for me so to do.'

In the Court of Appeal it was agreed that the wording of the question posed by the magistrate should be modified so that with the omission of the concluding words it should simply raise the single issue whether the magistrate had a power to suspend the sentence prescribed by s 1 of the 1970 Act. The Court of Appeal held that the magistrate was correct in holding the opinion that he had no power to suspend.

My Lords, I can find nothing in the Act of 1970 which repeals s 18 of the 1968 Act (i.e. the Treatment of Offenders Act); s 18 is not in any way referred to in the 1970 Act. When the 1970 Act was passed there was a clear distinction in the law of Northern Ireland between the passing of a sentence of imprisonment and the taking effect of such a sentence. Doubtless if a sentence of imprisonment is passed and if nothing more is said and no further order is made the sentence will then begin to take effect. But the very essence of the provisions contained in ss 18 to 21 of the 1968 Act was to differentiate between the imposing or passing (I see no difference between these two words) of a sentence of imprisonment and the serving of the sentence. An important change in the law was made. It involved a new method of the treatment of offenders. It could hardly have been forgotten by 1970. Only some new direct provision could sweep it away or brush it aside.

In the opening words of s 18 (1) of the 1968 Act it is provided that:

'A court which passes a sentence of imprisonment for a term of not more than two years . . . for an offence may order that the sentence . . . shall not take effect unless, during the period specified in the order, being not less than one year or more than three years from the date of the order, the offender commits in Northern Ireland another offence for which the court has power, or would, but for section 1, have power to sentence him to imprisonment, and thereafter a court having power to do so orders under section 19 that the original sentence . . . shall take effect . . .'

The whole basis which was introduced into the law relating to the treatment of offenders involved the difference between the passing of a sentence and the serving of a sentence (or in other words the taking effect of a sentence). A sentence which is passed but which (unless later events happen) is ordered not to take effect is called a suspended sentence (see s 33). If such a sentence is passed the court must explain in ordinary language that if during the specified period of suspense the offender commits an offence he will be at risk, in terms of s 19, that a court may order the sentence to 'take effect' and may do so either with the original term unaltered or with the substitution of a lesser term. The difference between the passing of a sentence of imprisonment and the taking effect of such a sentence is clearly observed throughout ss 18 and 19. The same difference between the passing of a sentence of imprisonment and the serving of such a sentence is to be noted in s 1 of the Act. In general it is provided (see sub-s (1)) that a court shall not 'pass a sentence of imprisonment on' a person under 21 years of age; but that restriction does not apply (see sub-s (3)) in the case of a person 'who is serving a sentence of imprisonment' at the time when the court passes sentence. So in s 33 (4) there is reference to 'a person who is serving or has served a sentence' and also to a sentence 'passed by a court'. Though a sentence which is passed but in reference to which an order under s 18 is made may, in the result, never 'take effect', yet in general (though with important exceptions) it is to be treated as a sentence of imprisonment (see s 18 (5) (a)).

My Lords, I see no reason for making any addition to the terms of what Parliament enacted on 1st July. The terms of the 1970 Act are clear and explicit. No problem of implementation seems to arise. As applied to the present case there was the result that notwithstanding that formerly a discretion as to sentence rested in a court if there was a conviction of the offence of disorderly behaviour in a road the obligation after 1st July was to impose a prescribed minimum sentence. But the power to suspend which since 1968 has been an inherent feature of judicial power and discretion is left completely untouched. In the long title are the words 'imposition of minimum sentences of imprisonment'; in s 1 (1) are the words 'be sentenced to imprisonment'; in the schedule are the words: 'Minimum sentence to be imposed'. The theme and the emphasis concerns the imposition of minimum sentences. The words 'be sentenced to imprisonment for not less than the period' are fully in accord with the other words I have quoted. Under the law as it stood on 1st July 1970, there was a discretion in the court (subject to the conditions laid down) to order that in the case of someone 'sentenced to imprisonment' the sentence should not at once take effect. If Parliament had wished to alter the law it could have done so. It could easily have done so. It did not do so.

If it is thought that Parliament intended not only to enact that for certain offences certain minimum sentences should be passed but also to enact that such sentences should, whatever the circumstances, be served and never be suspended it must surely be said that the only safe guide to the intention of Parliament is to be found in the language it has used. The words that have been used are clear. There is no ambiguity. There is no difficulty in the operation of the new enactment. If it is possible that Parliament had meant to go further than it did and had *per incuriam* omitted to include a provision that it had wished to include then it is for Parliament to remedy their omission.

I do not forget that the Act of 1970 was passed so as to deal with certain offences committed during a period of emergency. The nature of such offences may be realised when it is seen that the scheduled acts include those relating to malicious damage and to explosives and to firearms and to the protection of persons and property and the maintenance of public order. It can readily be understood that it was thought desirable to enact that certain minimum sentences should be imposed. Depending on the particular circumstances of a particular case, but, having regard to the need to suppress disorder, decisions whether, in a period of emergency, to suspend a sentence will inevitably present problems of anxiety for a court. But even in those cases where, having regard to particular circumstances, a court did decide to suspend a sentence, the Act of 1970 would have introduced a change which would have potent and stringent deterrent effect. The sentence would in all probability be much more severe than that which but for the emergency would have been passed and it would have to be a sentence of imprisonment. It would be in suspense for a period during which leniency in respect of any further misbehaviour could not be assumed.

It had been enacted by Parliament (see s 1 (1) of the Treatment of Offenders Act (Northern Ireland) 1968) that in general a court could not pass a sentence of imprisonment on a person under 21 years of age. There were careful provisions relating to centres in which, if necessary, young offenders might be detained. Under the 1970 Act there is the requirement that regardless of age and regardless of any particular circumstances a conviction of certain offences must result in the imposition of certain sentences. In the absence of some clear enactment it is difficult to suppose that Parliament intended that whatever were the circumstances the sentences of imprisonment imposed on young offenders so convicted must in all cases at once take effect. Nor is it easy to suppose that Parliament considered that relief from a result so drastic was only to be found in the exercise of the powers of the royal prerogative.

Faced with clear and unambiguous and well-understood language, producing results neither anomalous nor irrational, I would be loath indeed to have to guess or speculate whether Parliament had wished to do more than it did; even if a suspicion to that effect could be entertained I would be loath indeed to act on any such suspicion by construing a penal statute so as to add to it a provision of stringency which it does not contain.

I would answer the question raised by saying that Parliament has left unaffected the power to suspend.

**LORD WILBERFORCE:** I have had the advantage of reading the opinion of my noble and learned friend, LORD MORRIS OF BORTH-Y-GEST. I agree entirely with it, but I add some observations because I see some importance in the case.

We are asked to interpret s 1 (1) of the Criminal Justice (Temporary Provisions) Act (Northern Ireland) 1970—the question being whether this section has taken away, or has left intact, the power of the courts to order suspension of a sentence of imprisonment. This power was conferred by the Treatment of Offenders Act (Northern Ireland) 1968, in a fasciculus of carefully drafted sections. The relevant language has been stated and analysed by my noble and learned friend. It shows, in my opinion, beyond doubt that, in the conception of the legislature which passed it, there is a clear distinction between passing a sentence of imprisonment and ordering that the sentence shall not take effect, or suspending sentence, a distinction recognised in England and reflected in the language of LORD PARKER CJ in *R v O'Keefe* (1). This distinction is preserved with consistency of language throughout ss 18 and 19. It is not a purely linguistic distinction, for it reflects the basic conception that a suspended sentence is a sentence of imprisonment (s 18 (5) indeed says so explicitly): the offender has been given a prison sentence for the specified period. But this does not take effect unless another offence is committed during the period of suspension.

With this in mind I come to the Act of 1970. In its long title it is described as an Act 'for the imposition of minimum sentences of imprisonment . . .' and s 1 (1) requires that persons convicted of a scheduled offence shall be sentenced to imprisonment for not less than the relevant period specified in the schedule. The schedule under a column headed 'Minimum sentence to be imposed therefor' sets out certain periods in respect of each offence. There is nothing here which on the face of it touches or affects the power to suspend. Nothing more is done than to remove any power to fine, or grant a conditional discharge, or put on probation, and in some cases to alter the period for which the sentence is to be passed. The enactment fits into the scheme of the 1968 Act without conflict or ambiguity. If it is said (the Attorney-General did not say it) that s 1 (1) uses the words 'shall be sentenced to imprisonment' instead of referring to the passing of a sentence of imprisonment (as in s 18 (1) of the Act of 1968), I reply that to me the expressions are identical, as they clearly were to the draftsman of the Act of 1968: see s 18 (3); and, unless this Act is to be interpreted quite differently from the Act of 1968, recent and in *pari materia*, I am quite unable to extract a prohibition against suspension from the word 'imposition' which appears in the long title.

But the real argument against the appellant is not a linguistic one. The Court of Appeal's judgment is based on a 'purposive' interpretation. We are entitled to know that the Act of 1970 was passed to deal with a situation of civil disturbance and so it is said that its purpose must have been that anyone convicted under it without exception should receive, and *actually serve*, a short sharp sentence of imprisonment—I use the words of LORD MACDERMOTT CJ.

(1) 133 JP 160; [1969] 1 All ER 426; [1969] 2 QB 29.



My Lords, there is much to be gained, in many cases, by purposive interpretation, but a first and paramount condition must surely be that the purpose relied on should be clearly and indisputably ascertained. Where, in the present case, do we get the alleged purpose from? Not from the long title, which refers only to minimum sentences; not even from the Attorney-General. Indeed if he had urged on us the manifest purpose of the Act, I think I know what the reaction to such an argument would have been. But no such contention came from him. It is suggested that it would be strange to take away the right of the court to impose a fine or to order a discharge or a conditional discharge and leave the right of suspension. But one must see what the Act does: offenders are to have a sentence of imprisonment in all cases: a serious change to a serious punishment which even if suspended (and it may not be) hangs over their head—a stigma and a deterrent. I do not find this so strange as to compel me to depart from what the Act of 1970 has clearly said, or to enable me, by implication, to fill in what the Act of 1970 has not said. Again, it is suggested that no sensible Parliament would impose minimum sentences and leave the courts with a right to suspend. But, except that one line of policy is more severe and the other more flexible, I do not feel competent to judge the wisdom of the enactment. I suspect that this argument overlooks that it does not follow that, if a power to suspend exists, it will generally be exercised, unless the assumption is that the courts cannot be trusted. But is there not some sense in leaving the courts with power to deal flexibly with cases such as that of the appellant who has been caught in the meshes of the law without any political content to his offence? I cannot be sure that Parliament, if it had thought of such cases, would have removed the power to suspend; and unless I am sure, I have no warrant to make good Parliament's omission.

Another suggestion has been that the purpose of the Act of 1970 was to produce uniformity and that a power to suspend would destroy this. But I do not see how this argument can stand against the words in s 1 (1) 'be sentenced to imprisonment for not less than the period . . .' As LORD MACDERMOTT points out, the schedule specifies periods not more than maxima provided for by the relevant enactments and generally less. So on any view the courts are left with a discretion.

As a last resort s 1 (3) of the Act of 1970 is referred to. There is always the royal prerogative. I find this a feeble support. In the first place, is it satisfactory that every small offence which falls outside the political area (and there may be many) must be passed through this cumbrous process? And, secondly, the prerogative provides but a crude solution; remission or a pardon may not be a satisfactory way of dealing with persons who have committed a minor offence deserving some sanction but not a custodial sentence.

A number of minor arguments of detail were drawn from other provisions in the Act of 1968, but these are feathers in the scale. We are dealing with the criminal law and the liberty of the subject. This is surely a case where the best guide to Parliament's intention is to be found in what it has said. It has altered the periods of sentences. It has not said, as it so easily might, that sentences passed are not to be suspended and must be served, and I cannot bring myself to read this into the Act I would allow the appeal.

**LORD DIPLOCK:** I think that when a statute requires that a person who is convicted of an offence shall be sentenced to imprisonment for a specified minimum period, the natural meaning of the words 'shall be sentenced to imprisonment' is that he shall be punished for that offence by being sent to prison. I do not think that this requirement is satisfied by any order of a court which does not have this effect.



It has been submitted that 'sentenced to imprisonment' in the Criminal Justice (Temporary Provisions) Act (Northern Ireland) 1970 has a technical meaning wider than this because in s 18 of the Treatment of Offenders Act (Northern Ireland) 1968 a court which passes what is thereafter referred to as a 'suspended sentence' is described as passing a 'sentence of imprisonment' notwithstanding that the court makes a simultaneous order that (i) the sentence is to have no effect unless the offender commits some other offence during a limited period and (ii) even if he does commit a subsequent offence the court's order determines not the minimum but the maximum period for which the offender may be sent to prison. It is easy to see why, as a matter of drafting, it was convenient at the outset of that particular section of the 1968 Act to use the expression 'sentence of imprisonment' proleptically to describe an order which might in some circumstances have the effect of sending the offender to prison. But I do not see why this compels one to ascribe a corresponding proleptic meaning to the different expression 'shall be sentenced to imprisonment' in the context of a later Act which requires that imprisonment shall be for a specified minimum period.

For this reason, I do not find as much difficulty as my noble and learned friend, LORD REID, in construing the words of the 1970 Act 'shall be sentenced to imprisonment', in the sense that I have indicated; but I agree that the other considerations to which he refers point conclusively to its being the intention of the legislature that the words should be so understood. I would dismiss this appeal.

*Appeal dismissed.*

Solicitors: Somers & Laity; Linklaters & Paines.

G.F.L.B.

### COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, KARMINKSI AND MEGAW, LJJ)

27th, 30 November 1970

HESELTINE v HESELTINE

*Husband and Wife—Matrimonial home and other properties bought in husband's name with wife's money—Sums transferred by wife to husband at his request—Imposition of trust on husband.*

In 1951 a house was bought as the matrimonial home of a husband and wife. The property was conveyed in the husband's name, but the wife provided four-fifths of the purchase price. In 1957 and 1960 at the husband's request the wife transferred to the husband two sums of £20,000 because he told her that it would reduce the amount of death duty if she died before he did. In 1963 the wife transferred a further £20,000 to the husband who asked for this sum to assist him to become a Lloyd's underwriter. Between 1957 and 1962 four properties were bought with the wife's money, but were conveyed in the husband's name. Differences having arisen between the parties they separated, the matrimonial home was sold, and the wife took out a summons to determine her rights under the above-stated transactions.

Held: as to the proceeds of the sale of the matrimonial home, in such a case as this the court usually imputed a trust under which the husband was to hold the property for both parties in equal shares, but half-and-half was not an invariable division and if some other division was more fair the court would adopt it, and in the present case the fair division would be three-quarters to the wife and one-quarter to the husband; as to the three sums of £20,000 the husband held them on trust for the family and after the breakdown of the marriage on trust for the wife; as to the properties acquired between 1957 and 1962, as they had been bought with the wife's money, the court would impose a trust whereby the properties were held by the husband on trust for the wife.

**APPEAL** by Edwin Oswald Heseltine from an order made by Mr Registrar Stranger-Jones on the hearing of an application by his wife, Penelope Horsley Heseltine, under s 17 of the Married Women's Property Act, 1882, when the registrar declared that the husband held the property, 24 Rosslyn Hill, Hampstead, London, in trust for himself and the wife in the proportions of one-quarter and three-quarters respectively, that he held the net proceeds of sale of that property in the like proportions, that he held in trust for the wife three sums of £20,000 transferred by the wife to him, and that he held certain properties in Devon in trust for the wife.

*Leonard Caplan QC and G M Godfrey for the husband.*

*G H Crispin QC and N P L Price for the wife.*

**LORD DENNING MR:** The husband and wife married in 1944 when they were in their early twenties. He was then a major serving in the Army. He was demobilised a year or two afterwards. There were four children—three sons and one daughter. The marriage broke up in 1965. The husband left his wife and we understand that he is living now with another woman, but there has been no divorce. The application before us is as to the property of the husband and wife.

When they married the wife had very considerable means of her own. She had shares from her father in a private company. Those shares have greatly increased in value. The company has gone public. The shares would now be worth something in the region of £150,000. The husband was not so well off. He had some £2,000, and soon afterwards a legacy of £1,500, or thereabouts. He had, of course, his Army pay. After he left the Army, he was employed in the War Office. He earned £2,000 p year. In 1957 he went into a company where he earned £3,000 a year. Since 1960 he has done nothing active in business until recently.

The first item in dispute is the matrimonial home. It was at 24 Rosslyn Hill, Hampstead. It was bought in 1951 for a sum of £8,750, of which some £6,000 was left on mortgage. It was put into the husband's name. In order to cover the mortgage, an endowment policy was taken out on the husband's life. It remained the matrimonial home for many years. In 1968, after they separated, it was sold. By that time it had increased much in value. The equity, after paying off the mortgage, was worth £19,000. In addition, the policy on the husband's life was worth some £7,000. So far as the purchase price was concerned, the husband said: 'Four-fifths of the cost came from my wife.' The servicing of the mortgage and the policy (i.e. interest and premiums) came out of the family fund which was in their joint names.

This is a typical case where the matrimonial home was acquired by the joint resources of each, but was taken in the name of one only, i.e. the husband. In the usual way the court imputes a trust under which the husband is to hold it for them both jointly in equal shares. But half-and-half is not an invariable division. If some other division is more fair, the court will adopt it: see *Gissing v Gissing* (1). In the present case the registrar said that the division should be as to three-quarters to the wife and one-quarter to the husband. That seems to me to be entirely fair. It must be remembered that while the husband only gets one-quarter of the equity of £19,000, he has got the policy moneys of £7,000 for himself. So, in the result, the division on the whole transaction is not far off half-and-half.

The second item concerns two sums of £20,000. In 1957 the wife transferred £20,000 worth of her capital to her husband, and in 1960 another £20,000. She did it because her husband asked her to do so. He told her that it was for estate duty purposes, in case she died first, it would be better if her considerable capital was held half-and-half between them, half to be in his name and half in hers. Before asking her to do

(1) [1970] 2 All ER 780.

this, he took legal advice, but she did not do so and he did not suggest that she should. So, without legal advice, she did as he asked. She transferred these two sums of £20,000 and £20,000 into his name. She explained why:

'I had no outside advice, and I made the mistake of trusting my husband although it was against my instinct. The main point which weighed with me was I did not want to show insufficient trust by refusing.'

The husband himself said very frankly:

'My wife had full confidence in me and left it all to me, and readily fell in with anything I suggested; and the bulk of her fortune is now in my name.'

Counsel asked her about estate duty:

'Q Were the arguments put by your husband considered by you to be good arguments because you trusted him? A Yes.

Q So, pursuant to this, you gave £40,000 assets to your husband so that they would not be part of your property? A Yes.

Q Now you say you want these assets back? A In honour, I think I should have them back. I claim them all back.'

Counsel for the husband has urged before us today that this case is similar to the cases which we have had in this court where a husband puts property into his wife's name so that his creditors or the tax authorities should not get hold of it. The latest case is *Tinker v Tinker* (1). In those cases we have held that the husband cannot go back on what he has done. As I said myself in *Tinker v Tinker*:

'The presumption is that it was conveyed to her for her own use; and he does not rebut that presumption by saying that he only did it to defeat his creditors.'

He cannot take advantage of his own wrong. But those cases are entirely distinguishable from the present. The wife here has done no wrong. She only did what her husband asked her. That should not be taken against her. The court can and should impute a trust by him for her. That is the reason underlying all these cases between husband and wife. At least, that is how I understand *Gissing v Gissing* (2) where LORD DIPLOCK said:

'A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trust—is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired.'

What LORD DIPLOCK said about land applies also to shares, money, or chattels. If the conduct of the husband is such that it would be inequitable for him to claim the property beneficially as his own, then, although it is transferred into his name, the court will impose on him a trust to hold it for them both jointly, or for her alone, as the circumstances of the case may require. Applying this principle, it would plainly be inequitable that the husband should hold this £40,000 beneficially as his own. The wife put it into his name for the sake of them all, for his and her sake and all the family, because she trusted him. She had no legal advice. She did what he asked. She knew that the object was to save estate duty. She thought that if she

(1) [1970] 1 All ER 540; [1970] P 136.

(2) [1970] 2 All ER 780.

died before her husband, there would be less estate duty to pay. Whether they would have succeeded in escaping estate duty, I do not stay to enquire. Things did not happen that way. Something happened which she had never thought of. The marriage broke down. The husband left and set up house with another woman. Until that time the husband had applied the interest, and may be some of the capital, for the benefit of the family. It had gone into a joint account. But, once he left, the imputed trust (which had theretofore gone along quietly) came actively into play. It took effect so as to impose on the husband a trust for the wife—a resulting trust which resulted from all the circumstances of the case—whereby he held it on trust for her alone. I entirely agree with the registrar on this point.

The third item is another sum of £20,000. It was in 1963. The husband was minded to become a 'name' at Lloyd's. As we all know, a person who wishes to become a 'name' must put up securities. He must show his worth. At this time it was £90,000. The husband had not himself got £90,000. He said to his wife: 'Please transfer £20,000 to my name so that I can put it up and be a "name" at Lloyds.' She did so. He signed the certificate, which Lloyd's require, that he was worth £90,000 and had possessed it for the past 12 months. On the face of the certificate, the committee of Lloyd's emphasised—

'the great importance which they attached to this certificate, as the election of the candidate depends largely upon the information which it gives'.

Counsel for the husband said that the wife knew that he had to show himself to be worth this sum, and, therefore, she intended the £20,000 to be his property. But here again she had no legal advice. She had not the least intention of making him a gift out and out. She only did it to help him to be a 'name' at Lloyd's. This case falls under the same principle as I have just mentioned in regard to the £40,000. The circumstances are such that the court will impose a trust whereby the husband holds this fund of £20,000 on trust for the family, and, after the breakdown of the marriage, on trust for his wife. I agree with the registrar on this point too.

The fourth item concerns four houses at Dittisham in Devon. The family went down there for their holidays. In 1957 they bought two houses there, Passage House and 2 Greenway View, in 1961 Palm Cottage, in 1962 Ivydene. They were all conveyed into the husband's name. He paid for them out of a joint account of the parties. We have not seen that joint account and it has not been analysed before the court. But the registrar found that the moneys in it were solely the wife's, and that the properties, therefore, were held on trust by the husband for her. On this point we have been referred to the cases on joint account. I need not go through them all. They were all considered by STAMP J in *Re Bishop (decd)*, *National Provincial Bank Ltd v Bishop* (1). In some cases where husband and wife each contribute to a joint account, the proper inference is that they are putting their moneys into the account with the intention that they should belong to them both jointly. If the marriage breaks down, investments made out of that account belong to them jointly, usually half and half, although in the name of one only: see *Jones v Maynard* (2). But there are other cases where one party provides all the money in the joint account and it is only opened and used as a matter of convenience of administration. In such cases, if the marriage breaks down, the moneys belong to the one who provided them. So do any investments made with those moneys. Such a case was *Thompson v Thompson* (3). This case falls within that latter category. The moneys in this joint account belonged to the wife. It was operated by the husband for convenience of

(1) [1965] 1 All ER 249; [1965] Ch 450.

(2) [1951] 1 All ER 802; [1951] Ch 572.

(3) (29th April 1970) unreported.

administration for the family purposes. It was supplied largely from capital, the wife's capital, for they were living on capital. Seeing that it was the wife's money, the court will impose a trust whereby the houses which were bought with it are held by the husband on trust for the wife. It falls within the principle I have already stated. And so on this point also I agree with the registrar.

I must say that this is no great hardship on the husband. He has still a considerable property which the wife fully recognises. There is the insurance policy. There is another house at Dittisham which he bought after the break-up. There are also considerable investments in companies in which he is now working, and apparently doing very well. There are just one or two points on the order. It should say that the property was 'held' on trust, not 'holds' on trust. Then, as to the £40,000—the £20,000 in 1957, and the £20,000 in 1960—a question was raised whether these sums could be traced to their present holdings in shares. It should be possible. At any rate, the attempt should be made, but it must be remembered that the husband, over the years, has realised some of the original shares and used the capital for the benefit of the family. Also the interest. On the taking of any account, he should be given credit for all those payments for family purposes. There ought not to be any difficulty about the Lloyd's fund, because that is identifiable still. Subject to these small variations, I think the decision of the registrar was right and I would dismiss the appeal.

**KARMINSKI LJ:** I agree with the judgment of LORD DENNING and with the order he has proposed, but as it is a case of some general interest, I desire to add a very few observations of my own. Applying the test suggested by STAMP J in *Re Bishop (decd)*, *National Provincial Bank Ltd v Bishop* (1), to which LORD DENNING has referred, I have come to the clear conclusion that in the present case there is a strong body of evidence of intention that the joint account set up between the parties was to have a limited operation. I say that for this reason, having regard to the history of the transactions between the spouses which LORD DENNING has set out in some detail. In the present case the intention of the wife, from whom the money mostly came, is at least very material. She had no advice from any solicitor, though the husband had. What she did was to trust her husband completely, and what she did on his advice was something intended to preserve the assets as against estate duty for the family as a whole, i.e. the husband and the four children issue of this marriage. She confided her financial affairs entirely to her husband. She was apparently a lady of no financial knowledge or experience, but trusted her husband, very properly, absolutely at a time when the marriage between them was happy and apparently erected on solid foundations. Indeed when the transactions which we are considering were completed, these people had been married for something like 20 years, and there were no cracks visible in the structure of their marriage. The capital, of which the wife possessed a good deal, was deliberately used from time to time to bridge the gap between their available net income and their expenditure. Like many people in this walk of life, they were anxious to give their four children a good education, and we know that, although there is no evidence of where and when the daughter went to school, the three sons all went to boarding schools, both preparatory schools and public schools. That I should think, though there are no details about it, accounted for at least some of the use of capital. But in the end we have to come back to this position: Was the wife intending to part with these large sums of capital to the husband absolutely, or was she, as I am quite certain she was, aiming to set up a fund to protect the family as a whole? For those reasons I have come to the same conclusion as LORD DENNING, and I agree with the order proposed by him.

(1) [1965] 1 All ER 249; [1965] Ch 450.

**MEGAW LJ:** The first item of property with which we are concerned is the proceeds of sale of the house, 24 Rosslyn Hill, which was bought in the year 1951 and was sold in 1968. It was bought in the husband's name. His contention before the registrar and before this court has been that legally the proceeds of sale belong entirely to him, but both before the registrar and before this court it was stated that by way of concession, as distinct from submission as to legal rights, the husband would be content with and wished only to have one-half of the net proceeds of that sale. It was further contended on behalf of the husband that, even if his submission as to the legal position was wrong, he was not legally entitled to the entirety of the proceeds, the appropriate division in this case would be one-half to him and one-half to the wife. The registrar has held that the proper proportions for the division of the proceeds is one-quarter to the husband and three-quarters to the wife. The first point which is made on behalf of the husband in relation to that part of the property is what I may call the estate duty equalisation point. It is on that basis that it was contended that legally the whole of the proceeds belong to the husband. It was said that the fair conclusion on the evidence was that the property had been conveyed into the husband's name when bought with the knowledge and consent of the wife in order that the property of husband and wife might be made more equal in value so that in the event of the death of either of them the generality of the estate duty payable would be less. The learned registrar in his judgment has rejected that contention and in my view rightly rejected it. The husband, in his affidavit in reply to the wife's affidavit, stated: 'The purchase of 24 Rosslyn Hill . . . was made in my name, again for estate duty reasons.' The word 'again' is used there because the affidavit earlier dealt with two sums of £20,000 which in fact were later in point of time. The affidavit continues:

'The value of my wife's assets in 1951, when the property was purchased, far exceeded the value of my own, and it was clearly for the benefit of the family as a whole from the point of view of estate duty, that the house should be mine rather than my wife's.'

When the wife was cross-examined on this aspect of the case, according to the registrar's note of the evidence she said this: 'Rosslyn Hill bought as matrimonial home, bought partly with my money, in his name. I did not consider then anything else. Put in his name to avoid death duties.' However, when the husband came to give evidence, what he said in examination-in-chief was this: '1951 Rosslyn Hill.' And then there are one or two immaterial matters. 'Up to 1963 I thought in joint names, mortgage guaranteed by wife.' Pausing there, if the husband, as he says, thought up to 1963 that it was in joint names, he cannot possibly have thought or intended that the question of equalising the property for estate duty purposes had arisen in connection with this item. Then he went on in his examination-in-chief: 'Estate duty had not started to loom large at that time, my recollection.' In my view on that state of the evidence the registrar was fully entitled to come to the conclusion of fact to which he came. It must be borne in mind throughout that he had the advantage, that this court does not have, of having seen the witnesses and heard them being examined, cross-examined and re-examined, and that he was in a position to form a conclusion as to the reliability and truthfulness of their evidence on any particular matter and in general. What the registrar said about the evidence to which I have referred is this:

'The wife seems to think that the husband suggested the house should go into his name to avoid estate duty. But I think that the wife is really looking at the matter with hindsight, and bringing this possibility far too early into the picture.'



The husband's evidence, for what it is worth, was that estate duty did not loom large on the horizon at that time.'

That in my view was a fair and permissible conclusion on the evidence. The wife clearly by common consent was the partner in a marriage who was not looking after business affairs. That was left, at his own request and suggestion, entirely to the husband. It is not at all surprising if in a matter of this sort the wife, knowing that something at some stage had been said about estate duty equalisation, had thought when she came to be cross-examined, if what the husband said in the initial affidavit was true, that there had been some talk of estate duty at that stage, but in the light of the husband's admission with regard to it in his examination-in-chief the registrar was fully entitled to come to the conclusion, as a matter of fact, that there was no question of it being put into the husband's name in order that there might be an equalisation of estate duty in the event of the death of either of them. Then it is said that, even supposing that is so, nevertheless, though the wife would be entitled to some proportion, the correct proportion would be one-half to her and one-half to the husband. In examination-in-chief the husband said: 'Wife provided bulk of deposit. I sold about £450 savings certificates.' And when he was cross-examined he said: 'Rosslyn Hill was bought in my name. Four-fifths of cash came from my wife. I could not have bought property without her guaranteeing mortgage.' It is, of course, true that it does not necessarily follow that because the wife puts up a proportion of the deposit when the home is bought, therefore necessarily she is entitled to any share in the property beneficially, but I have no doubt whatever on the evidence in this case that she must in the circumstances be entitled to some share, and the only question is what is the appropriate share.

It was said in a recent decision of the House of Lords in *Gissing v Gissing* (1) that the proportion of money put up by the wife in circumstances such as these should properly be regarded as of great importance. LORD REID said:

'It is perfectly true that where she does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she has paid. Otherwise there must be a more rough and ready evaluation.'

LORD PEARSON in his speech said:

'I think also that the decision of cases of this kind has been made more difficult by excessive application of the maxim "Equality is equity". No doubt it is reasonable to apply the maxim in a case where there have been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the proportion borne by the contributions to the total price or cost is difficult to fix. But if it is plain that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing.'

In my judgment the registrar could well have awarded in this case four-fifths of the proceeds of sale to the wife on the basis of the evidence to which I have referred. However, there is no cross-appeal by the wife in relation to that matter. I am unable to see how the proportion of three-quarters to one-quarter on which the registrar decided can be challenged as being unfair or excessive in relation to the husband's interest therein.

The second type of property with which we are concerned is the two transfers of shares each worth approximately £20,000, made, as it now appears, in 1957 and 1960.

The point made on behalf of the husband is again the estate duty equalisation point. That is principally based on passages in the cross-examination of the wife. The first of those passages on which reliance is placed is a passage where the wife was giving evidence in relation to the Rosslyn Hill house and not in relation to the two items of £20,000, but it is said that that is an answer to be taken into account to show what the wife's state of mind and intention was in relation to the later transactions of the two items of £20,000. The wife there said in cross-examination: 'I did understand could only be hedge if his house absolutely.' And then in relation to the £20,000 transactions there were these questions:

'Q Were the arguments put by your husband considered by you to be good arguments because you trusted him? A Yes.

Q So, pursuant to this, you gave £40,000 assets to your husband; so that they would not be part of your property? A Yes.

Q Now you say you want these assets back? A In honour, I think I should have them back. I claim them all back.'

The registrar's conclusions in relation to that matter, having heard and considered all the evidence, including these passages which I have read, were given in this way in his judgment. He said:

'I accept the husband's evidence that there was a bonus issue of shares in the wife's family company worth £20,000 or thereabouts. I have no doubt that the husband said: "How about putting this in my name." But, nowhere did he say: "Will you give me this." The husband was always using grandiloquent phrases about "financial management", "good estate planning", "transferring this and that", but never anything about "giving". His case on the bonus issue is that she agreed to transfer it to him. I do not think for one second that she intended to give it to him.'

In my judgment, that conclusion on the evidence was one which cannot be faulted in this court. In relation to the second £20,000 the registrar said substantially the same thing. He said:

'I do not think for one moment that she appreciated that she was to give the shares to him. I do not think he asked her to "give" him anything. His talk was all of "good estate planning". I am quite satisfied that the wife never intended to give her husband this second sum of £20,000.'

I agree with what LORD DENNING has said in relation to that matter also and in relation to the tracing of the money. I need not deal further with the Lloyd's £20,000 transaction. There the securities, as I understand it, are still in existence in specie, and no difficulty can arise in relation to tracing. In my view there is no conceivable ground for faulting the judgment or the reasons given by the registrar in relation to that sum.

Finally, the last item of property is the four Devonshire houses. Those houses, as the registrar found after considering the whole of the evidence, were bought substantially with the wife's money and put into the husband's name. In relation to the first two of them he said:

'The facts were not seriously in dispute. The purchase money came out of the joint account standing in the names of the husband and the wife, being an account fed largely by the sale of various bits of the wife's capital. The husband's money was being used, although it was not sufficient for the purpose, for day-to-day living. It appears that the husband purchased these properties from

moneys in the joint account and put them both in his name. But the money applied in the purchase was solely that of the wife's.'

And in relation to the second two properties he said that his remarks in relation to the earlier two properties applied equally to these.

'The purchase money came out of the joint account which I have mentioned. In 1961 Palm Cottage was purchased; in 1962 Ivydene was purchased. The husband was not earning a penny. As I have already pointed out, paragraph 11 of his affidavit is a lie. The properties were certainly taken in his name, but with her money—her money alone. Therefore, I find that the husband holds these properties, too, in trust for the wife.'

I agree with the reasons put forward by LORD DENNING in his analysis of the authorities and of the law based thereon, and I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Gordon, Dadds & Co; Macfarlanes.*

G.F.L.B.

### COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, DAVIES AND MEGAW, LJJ)

14th December 1970

TARR v TARR

*Husband and Wife—Matrimonial home—Separation order obtained by wife—Husband tenant of home—Power of court to exclude husband for limited time—Matrimonial Homes Act, 1967, s 1 (2).*

By s 1 of the Matrimonial Homes Act, 1967: '(1) Where one spouse is entitled to occupy a dwelling house by virtue of any estate or interest or contract . . . and the other spouse is not so entitled, then, subject to the provisions of this Act, the spouse not so entitled shall have the following rights (in this Act referred to as "rights of occupation"):(a) if in occupation, a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the court given by an order under this section; (b) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house. (2) So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or regulating the exercise by either spouse of the right to occupy the dwelling house.'

HELD: to the word 'regulating' in subs (2) should be given a liberal meaning so as to enable the court to make such orders as to the occupation of a house as the nature of the case might require; the court, however, would not, and probably could not, on the application of a wife who had obtained a separation order containing a non-cohabitation clause make an order prohibiting the husband who was entitled to occupy the house by virtue of, eg, a contract of tenancy from ever occupying the house again, but it could make an order excluding him from it for a limited period or until further order.

APPEAL by Gladys Eileen Tarr from a decision of His Honour Judge Paton at Taunton County Court.

*J W Miskin QC and S B Thomas for the wife.*

*Peter Pain QC and Hazel Counsell for the husband.*

**LORD DENNING MR:** The husband, Anthony Denzil Tarr, and his wife, Gladys Eileen Tarr, lived at Wellington, Somerset. They were married on 16th June 1956. In 1957 they got a council house, 102, Priory, Wellington. It has two bedrooms. The tenancy was in the husband's name. They have lived there ever since. They have a son Michael who is now 12. In 1969 differences arose between them. On 17th December 1969, the wife went to the magistrates. She was granted a separation order on the ground of her husband's cruelty. It must have been a bad case of cruelty because the magistrates inserted in the order a non-cohabitation clause, which is equivalent to an order for judicial separation. Since that time the wife has lived in the house, but she has not been cohabiting with her husband. She works in Wellington and her son goes to school there. She has nowhere else to go. The husband is unemployed. His parents live in Wellington. He could, she says, go and live with them.

On 6th March 1970 the husband ordered the wife out. The husband's solicitors wrote to the wife's solicitors telling her that she was to leave the house immediately, but that he would give her a fortnight to find other accommodation. Faced with this demand, the wife retaliated. She made an application to the county court under s 1 of the Matrimonial Homes Act 1967. She asked that she should have the right to occupy the house and that the husband should be ordered out, not to re-enter without leave of the court. The registrar held that he had no jurisdiction to order the husband out. The county court judge affirmed his decision, but added:

'This point is bound to arise in a great number of cases as it is very likely that spouses between whom differences have arisen are living under the same roof in circumstances where, because of the size of the accommodation, it is really only practicable to exclude one spouse from the home.'

Section 1 of the Matrimonial Homes Act 1967 provides that when one spouse has the legal title to a dwelling-house, the other spouse has statutory rights of occupation. Then sub-s (2) provides:

'So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or regulating the exercise by either spouse of the right to occupy the dwelling house.'

The first part of that subsection deals with the 'statutory rights of occupation'. It covers such a case as the present where the wife has no legal title to the tenancy but nevertheless under the statute has 'rights of occupation'. In such a case either spouse can 'apply to the court for an order declaring, enforcing, restricting or terminating' her statutory rights of occupation. So in this case the wife under that part can apply for an order declaring that she has a right to occupy the house, but she cannot get an order taking away her husband's right. He has a legal right which is not within this first part. The second part of the subsection enables an order to be made which affects the legal right to occupy as well as the statutory 'rights of occupation'. It enables an order to be made 'regulating the exercise by either spouse of the right to occupy the dwelling house'. Those words apply in this case to the husband's legal right as a contractual tenant as well as to the wife's statutory right of occupation. The question is: What does 'regulating the exercise' of that right mean?

Counsel for the husband has urged before us, on the authority of cases in other branches of the law, that a power of 'regulating the exercise of a right' is a power to control the exercise, but not to prohibit it altogether. He points out that the wife

here asks for an order excluding the husband altogether from the house so long as she remains there. That goes beyond regulating, he says, and amounts to prohibition. Counsel for the wife admits that regulation does not warrant an absolute prohibition, but says that it does warrant a partial prohibition in space or in time. It is a nice point of construction, but I think counsel for the wife is right. I think that in this context the word 'regulation' should be given a liberal meaning so as to enable the court to make such orders as to the occupation of the house as the nature of the case may require.

Assume a case where the husband has the legal title (e.g. he is the contractual tenant) and the wife has statutory 'rights of occupation'. If the house is large enough for both to live there separately and apart, the court has power to split it up. The court can make an order giving the wife a right to occupy two or three rooms and excluding the husband from those rooms indefinitely. If the house is so small that both cannot live there together any longer, the court can make an order giving the wife the right to occupy it for the time being, and excluding the husband from it until further order. The court would not, and probably could not, make an order prohibiting the husband from ever occupying the house again. But it can make an order excluding him from it for a limited period or until further order, and it can continue that order from time to time as it thinks right. That comes well within the scope of 'regulating the exercise' of the right to occupy it.

I hold therefore that the county court judge had jurisdiction to entertain the wife's application. She asked perhaps for too much when she asked that the husband was to be excluded so long as she remained there, for that might get near to an absolute prohibition. But, though asking for too much, the judge could give her less than she asked. He could make an order that the husband was to go out until further order. At the same time he can make an order saying how and by whom the rent and other outgoings are to be paid, and so forth. He has ample jurisdiction to do what is right as between them both. I would allow the appeal accordingly.

**EDMUND DAVIES LJ:** If I may be allowed to do so, I should like to express my very real sympathy with the registrar of the county court who dealt with this matter. His difficulties arose from two sources. First of all, he was called on to construe a subsection of the Matrimonial Homes Act 1967 which is drafted in unnecessarily obscure language. I cannot for my part see that there would have been any problem in avoiding the dichotomy in s 1 (2). It has given rise to difficulty in this case, it has given rise to difficulty in past cases, and, if it is left unamended, it may continue to give rise to difficulty. I cannot see that there need be a division between controlling the non-property owner's rights of occupation, on the one hand, and regulating the property owner's right to occupy, on the other. Clarity is surely attainable by amalgamating those two, and one would then not have the difficulty which has arisen in this and in other cases.

The second ground on which I would like to express my sympathy with the registrar is that he was being asked to make an order which counsel for the wife now concedes he had no power to make. What was being sought by the wife was a declaration

'that the [wife] is by virtue of s. 1 of the Matrimonial Homes Act, 1967, entitled to occupy the leasehold dwelling-house known as 102 Priory, Wellington aforesaid and ordering that the [husband] do on or before seven days from the date of the order vacate the said premises and not re-enter them without leave of the court.'

In para 5 of her originating motion she said:

'I find that in view of my husband's continuing physical cruelty I cannot be expected to remain in the same house as him any longer. I have no other house to go to as I work in Wellington and my son also attends school here.'

In the notice of appeal against the learned judge's dismissal of the appeal from the registrar's order it is clear that what was being sought was an order for the total exclusion of the husband from the dwelling-house unlimited in time. Ground 1 may be taken as an example of the three grounds which are set out:

'That the learned judge was wrong in law in holding that he had no jurisdiction under the provisions of s. 1 of the Matrimonial Homes Act, 1967, to exclude the [husband] from the said premises whilst the [wife] remained there.'

No kind of limit was placed on the exclusion sought, either in the extent of occupancy or in its duration. The learned judge upheld the registrar's decision that he had no jurisdiction to make such an order. Nor, to my mind, had he. But that does not solve the question what is meant by the phrase 'regulating the exercise by either spouse of the right to occupy the dwelling-house'. I have veered a good deal during the hearing as to whether the adverb 'regulating' could possibly apply to the complete exclusion of the spouse from the house even for a short period. Counsel for the husband has cited several cases with a view to persuading us that such total exclusion, no matter how temporary, cannot be regarded as a 'regulating' of the exercise by the husband of his right to occupy. But ultimately I have come to the conclusion that counsel was overstating his case, and that there can be an exclusion from a part of the premises and also an exclusion from the whole of the premises for a limited period. An effective cutting down of the unlimited right which the wife was seeking could in my judgment be achieved by limiting the exclusion of the husband from the house until further order. That was an order which the learned judge, it is true, does not appear ever to have been invited to make, for the wife went all out for the full relief she was claiming. But the learned judge, like the registrar, was not bound to grant all that was asked for or to deal with the application on the basis that it was all or nothing. I think the registrar was wrong in saying: 'I have no jurisdiction to entertain the wife's application at all'. In my judgment he had jurisdiction to make the modified order I have indicated, and that jurisdiction he should have proceeded to exercise. What conclusion he would have come to in exercising that jurisdiction is, of course, an entirely different matter and one to be determined hereafter. Accordingly, in this by no means easy case, I concur in allowing this appeal.

**MEGAW LJ:** To my mind an order which prevents the spouse who is entitled to occupy a dwelling-house from occupying it for a period of time is an order regulating the exercise by that spouse of the right to occupy the dwelling-house within the meaning of those words in s 1 (2) of the Matrimonial Homes Act 1967. I agree that the appeal should be allowed and that the order should be as proposed by LORD DENNING MR for the reasons given by him.

*Case remitted to county court judge.*

Solicitors: *Jaques & Co*, for *Clarke, Willmott & Clarke*, Wellington, Somerset;  
*Broomhead & Saul*, Taunton.

G.F.L.B.



COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, SACHS AND BUCKLEY, LJJ)

25th, 26th January 1971

COLEEN PROPERTIES LTD v MINISTER OF HOUSING AND LOCAL  
GOVERNMENT AND ANOTHER

*Housing—Compulsory purchase—Clearance area—Adjoining land—Need to show purchase necessary for satisfactory development or use of cleared area—"Cleared area"—Housing Act, 1957, s 43 (2).*

By s 43 (2) of the Housing Act, 1957: 'Where the local authority determine to purchase any land comprised in . . . a clearance area, they may purchase also . . . any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or use of the cleared area.'

To acquire such adjoining land compulsorily the local authority must show by clear evidence that the acquisition is reasonably necessary for the satisfactory development or use of the cleared area. This is a condition precedent to the exercise of their powers to take away a subject's property. They must produce evidence, e.g., an outline plan of the proposed development, of what kind of development of the area would be satisfactory and why the acquisition is reasonably necessary. It is not sufficient for the local authority to assert that the acquisition of the adjoining land is reasonably necessary for the satisfactory development or use of the cleared area.

Per LORD DENNING, MR: 'Cleared area' at the end of s 43 (2) is not confined to the clearance area together with any pockets of land which are surrounded by it; it extends to other clearance areas and any land linking them, land providing access, and so forth, but it does not extend to any adjoining land which the local authority feels it is desirable to acquire.

APPEAL from the order of LYELL J dismissing a motion by the appellants, Coleen Properties Ltd, to quash an order made by the Minister of Housing and Local Government confirming the Sidney Street/Clark Street (Areas Nos 1 and 2) Compulsory Purchase Order 1967, made by the London Borough of Tower Hamlets, so far as it affected 61a, 63, 63a and 65a Sidney Street.

*A B Dawson* for the applicants.

*Gordon Slynn* for the Minister.

The council did not appear.

**LORD DENNING MR:** This is an interesting case about compulsory acquisition. It concerns Clark House, which is in Tower Hamlets at the corner of Sidney Street and Clark Street. It is a first class property which was built in 1956 after the bombing. It has four shops on the ground floor and six self-contained flats on the two upper floors. The local council desires to acquire it so that it can develop the area nearby. The question is whether it has any power to acquire it compulsorily.

Clark House is a good house but has very poor property next to it. On one side, along Sidney Street itself, there is a row of 25 houses, which are about 100 years old. All of them are in a terribly bad condition, save for one in the middle of the row. On the other side, along Clark Street, there is a row of another ten houses which are in equally bad condition. The council has proclaimed these two rows of houses to be two 'clearance areas', which it proposes to acquire compulsorily. They only occupy two-thirds of an acre altogether. But the council wants another quarter of an acre as 'added land'. This 'added land' includes Clark House. Those two streets are two sides of a rectangular block. The other two sides of the rectangle are Damien Street and Nelson Street. Those streets are not clearance areas. But the council is in a

position to buy some of the properties there because they are owned by the Greater London Council which is willing to sell them to the council. In addition, within the rectangle, facing on to Damien Street, there is a Roman Catholic secondary school which occupies a considerable area. There is no evidence that the council is proposing to buy it or is in a position to acquire it. The whole area is zoned in the development plan for residential use. If the council acquires all the land it wants, it proposes to develop the sites by the erection of 114 dwellings. To do this, it will presumably pull down all the old houses, and also Clark House, and replace them with other buildings.

The question is: Is the council entitled to acquire Clark House? It relies on the Housing Act 1957, particularly s 43 (2) which provides:

'Where the local authority determine to purchase any land comprised in the area declared by them to be a clearance area, they may purchase also any land which is surrounded by the clearance area and the acquisition of which is reasonably necessary for the purpose of securing a cleared area of convenient shape and dimensions, and any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or use of the cleared area.'

The last words are the important ones.

On 7th May 1968, the inspector held a public local inquiry and inspected the properties. The council called witnesses to show that the old houses in the clearance areas in Sidney Street and Clark Street were in terribly bad condition. It called the medical officer of health, the housing officer, and the public health housing inspector, but it did not call any witness as to the planning merits. It did not call an architect or a planning officer. It called no one to show that it was necessary to acquire Clark House. It merely asserted, through the mouth of its advocate, the deputy town clerk, that 'the acquisition of which properties (i.e. the added lands including Clark House) is reasonably necessary for the purpose of satisfactory development or use of the clearance areas (i.e. the old houses)'. In short, the council relied on its own ipse dixit that Clark House fell within the section. The appellants, however, called a qualified surveyor and architect, Mr Mallett, FIAS, FALPA, who could and did give evidence on planning merits.

On 22nd May 1968, the inspector made his report to the Minister. He reported as to Clark House:

'This is a first class property and I am of the opinion that its acquisition by the council is not reasonably necessary for the satisfactory development or use of the cleared area.'

So the inspector recommended that it be excluded altogether from the compulsory purchase order. On 25th October 1968 the Minister gave his letter of decision. He rejected the inspector's recommendation in these three sentences:

'the Minister disagrees with the inspector's recommendation with regard to Reference No. 13 [i.e. Clark House]. It appears to him that by the very nature of its position, the exclusion of this property must seriously inhibit the future redevelopment of the rectangular block of land between Sidney Street and Damien Street in which it stands. He has decided, therefore, that the acquisition of Reference 13 [Clark House] is reasonably necessary for the satisfactory development or use of the cleared area.'

So the Minister said that Clark House was to be included in the compulsory purchase order.

The appellants (the owners of Clark House) appealed to the High Court in accordance with Sch 4, para 2, to the Housing Act 1957, which enables an order to be questioned if 'it is not within the powers of this Act or that any requirement of this Act has not been complied with'. Under that provision, it has been held in *Ashbridge Investments Ltd v Minister of Housing and Local Government* (1) that:

'the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which, on the evidence, he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law.'

LYELL J affirmed the Minister's decision, but I must say that he seems to have proceeded on grounds which were not warranted by the evidence, particularly as to the school. The appellants appeal to this court.

In my opinion the Minister was in error in reversing the inspector's recommendation. The Minister had before him only the report of the inspector. He did not see the premises himself. To my mind there was no material on which the Minister could properly overrule the inspector's recommendation. Clark House is a first class new property. It has shops with flats over. In order to acquire it compulsorily, the council must show that the acquisition 'is reasonably necessary for the satisfactory development or use of the cleared area'. In order to show it, the council ought to have produced some evidence to the inspector as to what kind of development would be a 'satisfactory development' of the area, and to show how the acquisition of Clark House is 'reasonably necessary'. I do not say that it ought to have produced a detailed plan of the proposed development. I realise well enough that in many cases that may not be practicable. For instance, when an area is to be developed for industrial purposes, one cannot go into details until one has the business men wanting the factories. But, when an area is to be developed for residential purposes—for the council's own housing plans—it ought to be possible to give an outline plan of the proposed development. I cannot myself see that the council could get any more dwellings on to the site of Clark House than the six flats which are already there. The council may desire to make a neat and tidy development of these two streets, including Clark House, but this may well be possible while leaving Clark House standing. At any rate, I am quite clear that the mere ipse dixit of the council is not sufficient. There must be some evidence to support its assertion. And here there was none.

Then there is the report of the inspector. He was clearly of opinion that the acquisition of Clark House was not reasonably necessary. I can see no possible justification for the Minister in overruling the inspector. There was no material whatever on which he could do so. I know that on matters of planning policy the Minister can overrule the inspector, and need not send it back to him, as happened in *Lord Luke of Pavenham v Minister of Housing and Local Government* (2). But the question of what is 'reasonably necessary' is not planning policy. It is an inference of fact on which the Minister should not overrule the inspector's recommendation unless there is material sufficient for the purpose. There was none here. In my judgment the Minister was wrong and this court should intervene and overrule him.

In the course of the argument before us there has been a discussion as to the meaning of 'cleared area' at the end of s 43 (2) of the Housing Act 1957. Does it mean only the

(1) 129 JP 580; [1965] 3 All ER 371.

(2) 131 JP 425; [1967] 2 All ER 1066; [1968] 1 QB 172.

clearance area together with any pockets of land which are surrounded by it? Or does it extend to the area which is to be cleared including the adjoining land itself? There are cases which show that it is not confined to the clearance area itself. It extends to other clearance areas and any land linking them. That appears from the decision of SWIFT J in 1935 in *Sheffield Burgesses v Minister of Health* (1), and from the recent decision of ASHWORTH J in *King v Minister of Housing and Local Government* (2). Also, moreover, to land providing access, and so forth, as appears from the recent unreported decision of BRIDGE J in *Bass-Charrington (North) Ltd v Minister of Housing and Local Government* (3). But I do not think it extends to any adjoining land which the local council feels it is desirable to acquire. One has to start with the clearance area of the bad old houses, because they have got to come down anyway. Then one takes in such of the adjoining land which is reasonably necessary. But I do not think it gives an unlimited power to the local council to take in any adjoining land which it feels it would like to have. Otherwise, I do not think it necessary to decide one way or the other as to the meaning of 'cleared area'. I would allow the appeal and reverse the Minister's decision.

**SACHS LJ:** I agree. It is perhaps convenient first to refer to the preliminary point of law which has been raised. It was submitted that the applicants that the phrase 'any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or use of the cleared area', should be taken as referring solely to the clearance area plus the surrounded properties. That is what has been described as the narrow view of that particular passage. The wider view is that the cleared area refers to all property close at hand and in particular to what might be described as 'linked areas'. At the lowest in favour of the applicants it may be said that the passage in the context of s 43 (2) of the Housing Act 1957 as a whole is susceptible of at any rate two different meanings. If so, it is normally considered that the meaning should be adopted which is most in favour of the subject whose property is to be taken from him, so as to give him protection from such deprivation. Indeed such an interpretation would do little harm to local authorities. It would leave them free to make out their case under Part V of the Housing Act 1957 with a view to exercising their powers under s 96. If left to make up my own mind unaided by past decisions, I would have found it a matter of considerable difficulty to decide which was the correct interpretation. This point has, however, been consistently decided in favour of the Minister over a long series of cases, the first of which was some 35 years ago, *Sheffield Burgesses v Minister of Health* (1) to which LORD DENNING MR has referred. It was a decision of SWIFT J on precisely the same phraseology in s 3 of the Housing Act 1930. That decision has, therefore, stood for a very long time and has been acted on in accordance with its tenor. In these circumstances I prefer not to express any concluded view on that preliminary point since this appeal can be disposed of on the main submission made by counsel for the applicants.

That submission raised the question whether there was any evidence before the Minister on which he could properly come to a conclusion which would enable him to exercise the powers that stem from the provisions of Part III of the 1957 Act—clearance and redevelopment. Was he entitled to reverse the finding contained in the inspector's report to the effect that it was not reasonably necessary for the satisfactory development or use of the cleared area to acquire the property at the corner known as Clark House? The need for evidence to be available to a Minister before he can act has been the subject of earlier decisions. The question before him

(1) 100 JP 99; [1935] All ER Rep 703.

(2) 15th January 1970 unreported.

(3) 12th May 1970 unreported.

was not, to my mind, one of policy; it was in essence a question of fact that had to be established as a condition precedent to the exercise of the powers to take away the subject's property. It was no less a question of fact because it involved forming a judgment on matters on which expert opinion can and indeed ought to be given. (I rather doubt whether there is much material difference between the view I have just expressed and that of counsel for the Minister who has argued that the question was simply a matter of planning judgment which had to be based on evidence.) As long ago as the *Sheffield* case SWIFT J said:

'it is for this court, if the matter is brought before this court, to say whether there is any material upon which the Minister could have come to the conclusion that it was reasonably necessary. If this court comes to the conclusion that there is no such material, then this court will not hesitate to quash the Minister's order.'

That passage coincides with those passages in the judgment of LORD DENNING MR in *Ashbridge Investments Ltd v Minister of Housing and Local Government* (1) to which he has referred. The Minister, therefore, cannot come to a conclusion of fact contrary to that which the inspector found in this case unless there was evidence before the latter on which he (the Minister) could form that contrary conclusion. On the inquiry, an inspector is, of course, entitled to use the evidence of his own eyes, evidence which he as an expert, in this case he was an architect, can accept. The Minister, on the other hand, can only look at what is on the record. He cannot, as against the subject, avail himself of other expert evidence from within the Ministry—at any rate, without informing the subject and giving him an opportunity to deal with that evidence on the lines which are set out in regard to a parallel matter in the Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962. While the inspector, even if not an architect, may well be looked on as an expert for the purpose of forming an opinion of fact, the Minister is in a different position. It is by no means intended as a criticism to say with all respect that no Minister can personally be an expert on all matters of professional opinion with which his officers deal from day to day.

Before turning to the report and examining the evidence, there is a further observation to be made. When seeking to deprive a subject of his property and cause him to move himself, his belongings, and perhaps his business to another area, the onus lies squarely on the local council to show by clear and unambiguous evidence that the order sought for should be granted. What then is the state of the evidence here? Counsel for the Minister had properly pressed us to look at the site plan. This we have done with care. It is, of course, clear that the premises in question are at the corner of a rectangular island; moreover, for what I am about to say it matters not whether that island does or does not include St Bernard's School or the properties which belong to that school. From that plan it is quite plain that when developing the rectangle it may well be convenient to have the corner site included in the development so as perhaps to make it more homogeneous. It is plain that to get possession of it and include it in the development may well be 'a tidy idea' according to the canons of Whitehall. It may be that it is better from the point of view of looks. But all that is not enough. It must be reasonably necessary for the satisfactory development or use under consideration. The nature of the development or use under consideration in this case is to be found in the report, which refers to 'the area zoned in the development plan for residential use' and again in the Minister's own phraseology in his letter of 25th October: 'The council proposed to redevelop the two clearance areas for housing purposes.' That then is the object of the proposed

(1) 129 JP 580; [1965] 3 All ER 371.



development and use, but what materially serious obstacle to that objective is constituted by the existence of Clark House, a first class property reconstructed in 1956 at public expense and described as containing, *inter alia*, six self-contained flats with four shops? On the evidence there is nothing on which to suggest that there was any obstacle, far less a materially serious obstacle. There is no evidence that the demolition of Clark House would result in even a single extra family being housed. There is no evidence that any addition to the costs of the redevelopment scheme because Clark House was not acquired would approach or exceed the value of the buildings. There was no evidence that some amenity to the community to be housed on the redeveloped site would be lost. Thus there was no question of any gardens of Clark House being needed to such purpose—so far as I can see, it had none. There is no suggestion that Clark House or any portion of the area it occupied was needed for road widening, indeed the contrary was established. Thus there was no evidence whatsoever establishing that Clark House fell within the ambit of s 42 (3).

The architect inspector came to his conclusion after an inspection. His conclusions are certainly no help to the submission on behalf of the Minister that this site did fall within the subsection. On the contrary, on the facts of this particular case one would have thought that his opinion, the only expert opinion, was almost conclusive the other way. Having already made plain that the Minister was not entitled in this case to find as a fact that the premises were reasonably necessary for the purpose mentioned except on evidence before the inspector, and it being clear that there was no such evidence, he had no power to make the order, and in my judgment the appeal should be allowed.

**BUCKLEY LJ:** I agree that the appeal should be allowed. The crucial consideration here I think is whether there was material before the Minister in this case which justified him in the course which he took of declining to accept the recommendations of the inspector and of confirming the compulsory purchase order extending to the whole of this property including Clark House. Counsel for the Minister has submitted that that decision is a matter of planning judgment, but he concedes that the judgment must be based on some evidence. That evidence must be, I take it, evidence of a kind which would justify a reasonable man in reaching the conclusion which the Minister reached. Now the material on which reliance is placed for saying that the Minister had sufficient evidence before him to justify the course he took is to be found within the four corners of the inspector's report read in the light of the site plan which is before us. The site plan shows that Clark House is a rectangular block in the north-eastern corner of the area in which the rest of the land which it is proposed to clear and develop lies. Clark House stands on the junction of Clark Street and Sidney Street, and the main area to be cleared and developed also lies between the arms of Clark Street and Sidney Street. The material in the report on which counsel for the Minister has placed reliance is material which shows that the area including all the land is not in excess of about  $1\frac{1}{2}$  acres, that it is zoned for residential purposes, that the council proposes to redevelop it by erecting on it 114 dwellings, and that the inspector considered that other land which like Clark House is coloured green on the site plan and adjoins but is not comprised in the actual clearance areas was land which was appropriate to be included in the compulsory purchase order. He also relied on the fact that in the report the inspector records the fact that the council submitted to him that Clark House was reasonably necessary for the purpose of the satisfactory development or use of this site. This, however, is a mere assertion by the council and not evidence. The inspector, however, had the advantage, of which it is common ground he availed himself, of seeing the site on



a view. The Minister had not got that advantage. The only material that the Minister had before him was the material to which I have referred. He reached the conclusion which he expressed in these words:

'the Minister disagrees with the inspector's recommendation with regard to Reference No. 13. [i.e. Clark House.] It appears to him that by the very nature of its position, the exclusion of this property must seriously inhibit the future development of the rectangular block of land between Sidney Street and Damien Street in which it stands.'

I think that sentence is open to the comment that the rectangular block, the land there referred to, is not the relevant land for the purposes of s 43 (2) of the Housing Act 1957, for the land which is the subject-matter of the compulsory purchase order and the land which it is presently proposed to clear and redevelop is not a rectangular block and does not include a considerable area of land which is enclosed within the rectangular block bounded by Clark Street, Sidney Street, Nelson Street and Damien Street and is the site of St Bernard's Roman Catholic secondary school. There appears to be some possibility that at some unspecified time in the future the council may be in a position to negotiate a purchase of the site of that school and then to proceed to develop it in conjunction with the land that lies around it, but at present that is no part of the subject-matter of discussion, and the reason given by the Minister is therefore in my view open to the comment, at any rate, if it is not a criticism, that the Minister appears to have applied his mind to the merits of developing in some particular way the whole island site lying within the four roads, whereas what the section requires to be considered is whether the inclusion of this particular land is necessary for the satisfactory development or use of the land which it is proposed to include in the compulsory purchase order. But, ignoring that point, the Minister has not expressed any particular reasons for his opinion, and, for the reasons which my Lords and I have indicated, I think that he had no sufficient material before him on which to arrive at the view on which he purported to base his decision—a decision which was in conflict with the view of the inspector who was actually better able to form an opinion because he had the evidence of his own eyes to rely on, which was not evidence of a kind available to the Minister. As I think that the Minister had no sufficient material on which to reach the decision which he did reach, it follows that he acted *ultra vires* the section and that his decision is one which should not be permitted to stand. I therefore agree that this appeal should be allowed.

*Appeal allowed.*

Solicitors: Raymond Pollard & Co; Solicitor, Ministry of Housing and Local Government.

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, ASHWORTH, J, AND SHAW, J)

4th December 1970

HONIG v LONDON BOROUGH OF ISLINGTON

*Housing—Multiple occupation of premises—Requirements to execute works—Notice—Wilful failure to comply—Defence—Bona fide belief that works better performed later—Housing Act, 1961, s 15 (1) (3)—Housing Act, 1964, s 64 (1).*

Where a person fails to comply with a notice served on him by the local authority under s. 15 (1) of the Housing Act, 1961, requiring him to execute certain works to render such premises as are specified in the sub-section suitable for occupation by more than one family it is no defence, and does not render his non-compliance with the notice not wilful, that he genuinely believed that his failure to comply with the notice was in the best interests of all concerned because he contemplated that the requirements of the local authority would be fulfilled later in a better way than was immediately possible.

CASE STATED by Inner London Quarter Sessions.

*I Finestein QC* for the appellant.

*G N Butler* for the respondent.

**SHAW J:** This is an appeal by way of Case Stated from a dismissal by Inner London Quarter Sessions of an appeal by the appellant, Maurice Honig, against a conviction under s 65 of the Housing Act 1964, for having failed to comply with a notice served on him in July 1967 under s 15 of the Housing Act 1961. The question raised by the appeal is whether or not quarter sessions were right in coming to the conclusion upon the evidence that the appellant had wilfully failed to do work which he was required to do under the notice.

Section 15 (1) of the Housing Act 1961 provides in respect of premises which are let to more than one family that the local authority may serve

'a notice specifying the works which in the opinion of the local authority are required for rendering the premises reasonably suitable for such occupation . . . and requiring the person on whom the notice is served to execute those works.'

Sub-section (3) of s 15 provides that:

'A notice under this section shall require the execution of the works within such period, being not less than twenty-one days from the service of the notice, as may be specified in the notice . . .'

It was a common ground that, a notice under that section having been served on the appellant, it was not complied with after various extensions of the time for doing the works specified. What is now argued is that the appellant did not at any time wilfully disregard the requirements of the notice and that his failure to comply with them was due to extraneous factors outside his control which he regarded as justifying the delay in relation to the execution of the works.

The appellant was the owner and in control of the premises in question which were in multiple occupation and he was the proper person to serve with a notice under s 15 (1) of the Act. An informal notice was served on 24th February 1967 specifying certain works required to be carried out. A formal notice was served on 6th July requiring him to carry out the works to the premises specified in the

notice within four months. The appellant appealed to the Clerkenwell County Court against that order, and, on 21st November 1967, the county court dismissed his appeal subject to some minor variations in the works specified. On 24th November 1967 the local authority served on the appellant another notice under s 16 (1) of the Act requiring him to carry out certain works which, in the opinion of the authority, were necessary in relation to fire escapes. The appellant for one reason or another did not comply with the notices. After some discussion with the local authority in which he said he proposed to appeal against the notices, a compromise was arrived at by which the local authority agreed to give him a further ten weeks from 27th February 1968 to complete the works. That meant that he was given until 7th May of that year to carry out the works in respect of which notice was originally served in 1967.

The appellant, confronted now by two notices, decided that it was more important to do the fire prevention work than the other. It appears that he had intended in connection with the work to be done to get some new Ascot heaters which were not readily available. This was eventually the critical matter. It was stated in the Case that:

'Water heaters had to be obtained to comply with a part of the said works, the appellant told the builders to use new water heaters and not to rely on second hand ones, and the builders were unable to obtain new Ascot water heaters from the two merchants of whom they had made enquiry because of delays in supply by the manufacturers. It would have been impracticable to have started the s 15 work until it was known the kind of water heaters which were going to be used. No attempt had been made to obtain another kind of water heater prior to the laying of the information and no attempt had been made to obtain an extension of time for the carrying out of the s 15 works.'

The Case goes on to find that the whole of the s 15 works could have been completed within ten days, but lastly it was found that the Ascot water heaters were not obtained until after the information which resulted in the appellant's conviction had been preferred.

In those circumstances quarter sessions came to the conclusion that the appellant had failed to comply with a notice under s 15 of the Housing Act 1961, and that his failure was wilful within the meaning of s 65 (1) of the Housing Act 1964 which provides that

'if a person on whom a notice has been served under s 14, s 15 or s 16 of the Act of 1961 (power to require execution of works) wilfully fails to comply with the notice, he shall be liable on summary conviction'

to the penalties set out in the section. The Case goes on to say that it having been found that his failure was wilful

'in that he did not make nor did he intend to make all reasonable and proper efforts to carry out or cause to be carried out the s 15 works by due date as extended, nor did he intend to carry them out or cause them to be carried out, and that there was no reason why they could not have been so carried out, we dismissed the appeal against conviction and penalty and made no order as to the costs of the appeal. The question for the opinion of the High Court is whether the failure of the appellant to comply with a notice served upon him under s 15 of the Housing Act 1961 was wilful within the meaning of s 65 (1) of the Housing Act 1964.'

It is sufficient to say that the history of this matter provides abundant evidence for finding that the failure of the appellant was not due to force majeure or some accidental cause or impossibility, but was the result of a course of conduct which he had chosen to pursue. Whether the motives for his doing so were good or bad is immaterial. For my part it seems that the arguments addressed to this court by his counsel amount to this, that the intention of the appellant was not to disobey the notice, his ultimate failure to comply with the notice resulted from his wish to get the materials which were in his opinion proper, and that he intended all the time to comply with the notice. But the fact is that the course which he adopted did bring about a failure to comply with the terms of the notice. It was something which he had decided to do albeit he asserts that his motives were good.

There was cited to us *Arrowsmith v Jenkins* (1) which is a case dealing with obstructing the highway. It is unnecessary to deal with the facts of that case, but counsel for the appellant relied on this passage in the judgment of LORD PARKER, CJ:

'I am quite satisfied that this provision on its true construction is providing that if a person without lawful authority or excuse intentionally, as opposed to accidentally, that is by an exercise of his or her free will, does something or omits to do something which will cause an obstruction or the continuance of an obstruction, he or she is guilty of an offence. Counsel for the appellant has sought to argue that if a person acts in the genuine belief that he or she has lawful authority to do what he or she is doing, then if an obstruction results he or she cannot be said to have wilfully obstructed. Quite frankly I do not fully understand that submission. It is difficult certainly to apply it here. I imagine it can be put in this way, that there must be some mens rea in the sense that a person will be guilty only if he knowingly does a wrongful act.'

If one may adapt what is said there to the facts of this case, what the appellant's counsel is saying is that, if a person fails to do something in the genuine belief that his failure to comply with a particular requirement is in the best interests of all concerned because it is contemplated that eventually the requirement will be fulfilled in a better way, then the non-compliance is not wilful. Reduced to its simplest terms that appears to be the argument, and for my part it appears to be an untenable one. As I have already said, the facts before the justices and the facts before quarter sessions provided ample foundation for the view that the appellant had wilfully failed to carry out the terms of the notice served upon him and I would dismiss this appeal.

**ASHWORTH J:** I agree.

**LORD PARKER CJ:** I also agree.

*Appeal dismissed.*

Solicitors: *D J Freeman & Co; M Casey.*

G.F.L.B.

(1) 127 JP 289; [1963] 2 All ER 210; [1963] 2 QB 561.

QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, MELFORD STEVENSON AND COOKE, JJ)

8th February 1971

LONDON BOROUGH OF RICHMOND v MOTOR SALES (HOUNSLOW) LTD

*Trade Descriptions—False trade description—Sale of second-hand car—False number of miles on indicator—Defence—Reliance by defendants on information supplied to them—Act or default of another person—Failure to take all reasonable precautions or exercise all due diligence—Trade Descriptions Act 1968, s 24 (1) (a), (b), (3).*

An information was preferred by the appellant local authority against the respondents, car dealers, alleging a contravention of s 1 (1) (b) of the Trade Descriptions Act, 1968, in that in the course of their trade or business they had supplied a car to which a false trade description of its history had been applied, the number of miles shown on the mileage indicator being false. The respondents bought the car from a car bargain centre in July, 1969, and sold it in August, 1969, with the indicator showing 17,000 miles, which was less than half of the true figure. Evidence was given that the respondents did not get in touch with the car bargain centre or any other person about the number of miles shown on the indicator, nor did they inspect the indicator or make any enquiries of the previous owners of the car. The justices dismissed the information, holding that the offence was proved, but that the respondents were entitled to rely on the defence provided by s 24 (1) (a) of the Act in that the commission of the offence was due to reliance by the respondents on information supplied to them or to the act or default of another person. On appeal by the prosecutor,

HELD: the respondents were not entitled to rely on the defence provided by s 24 (1) (a) since they were debarred from relying on it by s 24 (1) (b) in that they had failed to show that they had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence by themselves, nor could they avail themselves of the defence provided by s 24 (3) since they had failed to show that they could not with reasonable diligence have ascertained the falsity of the mileage; the case must, therefore, be remitted to the justices with a direction to convict.

CASE STATED by justices for the South-West Area of Greater London.

A complaint preferred by the appellants, the London Borough of Richmond, at Feltham Magistrates' Court alleged that the respondents, Motor Sales (Hounslow) Ltd, car dealers, in the course of the trade or business of motor car dealers supplied a Ford Cortina car to which a false trade description of the history of the car was applied, namely, that the number of miles shown on the mileage indicator of the car was false, contrary to s 1 (1) (b) of the Trade Descriptions Act 1968.

The justices found that the Ford Cortina was first registered in June 1967, it being then bought new by a company called Gazeway Plant Hire Ltd. On 3rd July 1969 Gazeway Plant Hire Ltd sold the car to Crockford Bridge Motors (Addlestone) Ltd, and the mileage indicator then showed that the car had been driven at least 36,000 miles. During that same month, the respondents purchased that car from the Car Bargain Centre at Hounslow for £475, and on 4th August 1969 they sold it to one Harry Charles Milwood for £585, the mileage indicator then showing 17,000 miles and not 36,000. It was quite clear, therefore, that, subject to any defence provided by s 24 of the Act, an offence had been proved against s 1 (1) (b), which provides as follows:

'Any person who, in the course of a trade or business—(a) applies a false trade description to any goods; or (b) supplies or offers to supply any goods to which a false trade description is applied; shall, subject to the provisions of this Act, be guilty of an offence.'

The justices, in acquitting these respondents, held that a defence had been made out under s 24. They said:

'We dismissed the case on the ground that although the offence was proved, the respondent was entitled to rely on the defence set out in s 24 of the Act, namely, that the commission of the offence was due to reliance on information supplied or the act or default of another person.'

Section 24 (1) provides:

'In any proceedings for an offence under this Act it shall, subject to subs (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.'

The local authority appealed.

V. *Levene* for the appellants.

The respondents did not appear.

**LORD PARKER CJ:** This is an appeal by way of Case Stated from a decision of justices for the South-West area of Greater London sitting at Feltham, who on a complaint laid by the appellants acquitted the respondents of an offence contrary to s 1 (1) (b) of the Trade Descriptions Act 1968, in relation to the sale of a Ford Cortina motor car.

In so far as the justices found that the respondents relied on information supplied, it is enough to say that they have found that

'the respondents took no record and did not contact the said car bargain centre or any other person about the number of miles shown on the mileage indicator,'

in other words, that at the time of purchase they never inspected the indicator or realised that it showed only 17,000 miles. Their real defence was, and, indeed, this may well have been the case, that the false reading on the indicator was due to the act or default of another person, somebody earlier in the chain of events. But in order to rely on the defence, the respondents also had to show under (b) that they had taken all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by themselves. As regards that, there is no suggestion that the respondents made any enquiries at all; not only did they not inspect the indicator, but, having the log book, they never made any enquiries of the previous owners of the vehicle. In those circumstances I cannot see how they can bring themselves within s 24 (1).

There is another point which was raised below and is raised in the Case, namely, that, even if they had proved that they came within sub-s (1), yet by reason of sub-s (2) they were debarred from relying on that defence. Sub-section (2) provides that where the defence is that the defendants relied on information supplied or the act or default of another person, then, unless leave is given by the court, they cannot rely on that defence unless they have given seven clear days' notice before the hearing to



the prosecutor giving such information identifying or assisting in the identification of that other person as was then in his possession. Apparently, nobody took the point before the magistrates, and for my part I prefer not to base my decision on the absence of the obtaining of leave in default of a notice, because I have little doubt that, if the point had been taken, the court would itself have granted leave.

Reliance is also made in the Case upon s 24 (3). That provides:

'In any proceedings for an offence under this Act of supplying or offering to supply goods to which a false trade description is applied it shall be a defence for the person charged to prove that he did not know, and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods.'

There again it seems probable that the respondents did not know that the indicator reading was false, but, as in the case of subs (1), they did not show that with reasonable diligence they could not have ascertained the falsity. In these circumstances this appeal must be allowed and the case sent back to the justices with a direction to convict.

**MELFORD STEVENSON J:** I agree.

**COOKE J:** I also agree.

Solicitor: A. W. Goode, Twickenham.

T.R.F.B.

## CASES IN THIS VOLUME TO DATE

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**CRIMINAL LAW** – Road Traffic offences. See **ROAD TRAFFIC** infra.

**CRIMINAL LAW** – Sentence – Suspension – Act providing minimum sentences for specified offences – Power of court to suspend sentence – Criminal Justice (Temporary Provisions) (Northern Ireland) Act, 1970, s 1 – Treatment of Offenders (Northern Ireland) Act, 1968, s 18 (1).

**Kennedy v Spratt** .. .. . **HL** 203

**CRIMINAL LAW** – Theft – Ingredients of offence – Consent of owner obtained by dishonesty – Facts proved justifying conviction of obtaining property by deception – No bar to conviction for theft – Theft Act, 1968, s 1 (1), s 2 (1) (b), s 15 (1).

**R v Lawrence** .. .. . **CA** 144

**CRIMINAL LAW** – Theft – Ingredients of offence – Intention of permanently depriving another of property – Direction to jury – Theft Act, 1968, s 1 (1), s 6.

**R v Warner** .. .. . **CA** 199

**CRIMINAL LAW** – Venue – Indictable offence – Place where defendant 'in custody' – 'Custody' – Criminal Justice Act, 1925, s 11 (1).

**R v Kulynycz** .. .. . **CA** 82

**GAMING** – Betting – Office – Advertisement – 'Premises giving access to a licensed betting office' – Display of sign on outside wall – Sign showing company's registered name and containing words 'turf accountants' – Indication that premises were licensed betting office – Betting (Licensed Offices) Regulations, 1960, reg 2 – Betting, Gaming and Lotteries Act, 1963, s 10 (5) (a), (b).

**Maurice Binks (Turf Accountants) Ltd v Huss** .. .. . **QBD** 148

**GAMING** – Forecast of future event – Photograph of players taken during football match – Ball not in photograph – Competitors required to mark most likely position of ball – Position later chosen by panel of judges – Success of competitors marking positions closest to that chosen by panel – Betting, Gaming and Lotteries Act, 1963, s 47 (a) (i).

**Ladbroke (Football) Ltd v Perrett** .. .. . **QBD** 181

**GAMING** – Pool betting – Lottery – 'Competition for prizes for making forecasts as to sporting events' – Need of skill in making forecasts – Lottery – Betting, Gaming and Lotteries Act, 1964, s 41, Sched 2, para 13 (a).

**Singette Ltd and Others v Martin** .. .. . **HL** 157

**HIGHWAY** – Obstruction – Stall for sale of goods – Implied licence by local authority.

**London Borough of Redbridge v Jaques** .. .. . **QBD** 98

**HOUSING** – Compulsory purchase – Clearance area – Adjoining land – Need to show purchase necessary for satisfactory development or use of cleared area – "Cleared area" – Housing Act, 1957, s 43 (2).

**Coleen Properties Ltd v Minister of Housing and Local Government** .. .. . **CA** 226

**HOUSING** – Multiple occupation of premises – Requirements to execute works – Notice – Wilful failure to comply – Defence – Bona fide belief that works better performed later – Housing Act, 1961, s 15 (1) (3) – Housing Act, 1964, s 64 (1).

**Honig v London Borough of Islington** .. .. . **QBD** 233

**HUSBAND AND WIFE** – Maintenance of wife – High Court order registered in magistrates' court – Application for variation – Substantial expenditure of time – Remission to High Court – Maintenance Orders Act, 1958, s 4 (4).

**Gsell v Gsell** .. .. . **PDA** 163

**HUSBAND AND WIFE** – Matrimonial home and other properties bought in husband's name with wife's money – Sums transferred by wife to husband at his request – Imposition of trust on husband.

**Heseltine v Heseltine** .. .. . **CA** 214

**HUSBAND AND WIFE** – Matrimonial home – Separation order obtained by wife – Husband tenant of home – Power of court to exclude husband for limited time – Matrimonial Homes Act, 1967, s 1 (2).

**Tarr v Tarr** .. .. . **CA** 222

**INFANT** – Custody – Order of magistrates – Appeal – Further evidence – Discretion of appellate court.

**Re B (T A) (an infant)** .. .. . **Ch D** 7

**LOCAL GOVERNMENT** – Merger of council with other councils to form county borough – Loss of employment of clerk and solicitor – Re-settlement and long term compensation – Local Government (Compensation) Regulations, 1963, regs 8, 14 (1) (c) (f).

**Myrddin-Baker v Teesside County Borough Council** .. .. . **QBD** 152

**QUEEN'S BENCH DIVISION**

(LORD PARKER, CJ, MELFORD STEVENSON AND COOKE, JJ)

11th February 1971

R v MARYLEBONE MAGISTRATE. Ex parte WESTMINSTER CITY COUNCIL  
R v INNER LONDON QUARTER SESSIONS. Ex parte WESTMINSTER CITY  
COUNCIL

*Quarter Sessions—Appeal—Plea—Change of plea—Enquiry whether plea of guilty at magistrate's court equivocal—Right to remit case to magistrate—Quarter Sessions entitled to consider only what happened before magistrate—Nothing in proceedings before magistrate casting doubt on plea.*

In considering whether a plea of guilty entered in a magistrate's court was equivocal or not, quarter sessions are entitled to consider only what happened before the magistrate. Where it is clear that the defendant fully understood a charge to which a plea of guilty was entered, and that nothing emerged in the statement of the police, in any mitigation, or at any stage in the proceedings before the magistrate which cast any doubt on the plea, no court has jurisdiction after sentence has been passed by the magistrate's court to entertain an application for a change of plea.

MOTIONS by Westminster City Council for an order of mandamus directed to the Marylebone magistrate requiring him to comply with an order of Inner London Quarter Sessions remitting to him the case of *R v Malik* with a direction to enter a plea of not guilty, or, in the alternative, an order of certiorari to Inner London Quarter Sessions quashing their order remitting the case to the magistrate.

*P I F Vallance* for the applicants.

*Gordon Slynn* for the respondent justice.

**LORD PARKER CJ:** On 7th February 1970 at Marylebone Magistrate's Court Margaret Malik was convicted of using premises for the purpose of habitual prostitution contrary to s 36 of the Sexual Offences Act 1956. She pleaded guilty, and from an affidavit which has been obtained from the magistrate concerned it is clear that great care was taken to make certain that she understood the charge and that she really wished to plead guilty, and she reiterated that she desired to plead guilty. She was then sentenced to six months' imprisonment and two suspended sentences of three months were brought into operation consecutively, making a total of 12 months' imprisonment. Thereupon she immediately appealed against both conviction and sentence to Inner London Quarter Sessions. So far as sentence is concerned, she claimed it was too severe. So far as conviction is concerned, she said: 'I wish to change my plea'. In the result Inner London Quarter Sessions proceeded to enquire into the matter, and, for reasons which do not appear, quarter sessions came to the conclusion that her plea had been entered by mistake. Accordingly, they remitted the matter back to the Marylebone magistrate with a direction to enter a plea of not guilty and to hear the case afresh. When the matter came back to the magistrate he refused and said: 'I am functus officio. Quarter sessions were wrong in doing this'. So he refused to act.

It is in those circumstances that counsel now appears on behalf of the applicants for alternative relief, either a mandamus to the magistrate to try the case on the plea of not guilty, or else a certiorari to Inner London Quarter Sessions to quash their decision remitting the matter of conviction to the magistrate.

I think for myself it is convenient to approach this case by considering the order made by Inner London Quarter Sessions. If the plea before the magistrate was, as it

has been called, an unequivocal plea, then once sentence had been passed by the magistrate and the conviction was complete it was too late for any court to entertain an application for a change of plea. Therefore, on the face of Mrs Malik's application to Inner London Quarter Sessions asking for a change of plea simpliciter, they clearly had no jurisdiction. What, however, is said is that they were not considering the matter simply as a change of plea but were enquiring into the question whether the plea before the magistrate had been an unequivocal plea or not. It is said that they decided it was an equivocal plea and on that ground sent it back to the magistrate.

Just as it is clear that it is too late to entertain an application for a change of plea after conviction, so it is equally clear that quarter sessions do have the right to enquire into the question whether the plea entered before the magistrate's court was an equivocal plea, and if they come to the conclusion that it was equivocal—what LORD GODDARD CJ always used to refer to as 'guilty but'—then quarter sessions are perfectly right in sending the case back to be re-tried. Such an order would be really on the basis that all that happened before the magistrate's court was a nullity and that the court must re-hear the case on the true plea. Quarter sessions apparently heard Mrs. Malik. We are told that she was rather a pathetic figure—she was very deaf—and she told them, and they apparently believed her, that she thought she was merely pleading guilty to prostitution. It was in those circumstances that they sent the case back to the magistrate.

For myself, I am quite satisfied that, in considering whether a plea is an equivocal or an unequivocal plea, one looks solely to what happened before the justices. A typical case was that of *R v Durham Quarter Sessions, ex parte Virgo* (1). That was a case in which an apparently unequivocal plea of guilty was entered to stealing a bicycle, but before sentence was imposed and before there ever was a conviction, it was revealed that the defendant was saying: 'But I took it by mistake', a typical case of 'guilty but'. In that case quarter sessions, having come to that conclusion, sent it back to the justices for re-trial. The enquiry in each case is as to what took place before the magistrates' court to see whether the court acted properly in accepting an apparent plea of guilty as an unequivocal plea.

As I understand this case, quarter sessions never went into that aspect of the matter at all. If they had, they would have found not only that the greatest care was taken by the magistrate to see that Mrs Malik understood fully what she was pleading to, but also that nothing emerged in the statement of the police, in any mitigation, indeed in any part of the case to show that there was any suspicion of it being a 'guilty but' case. In those circumstances once it is shown that nothing which took place before the magistrate cast any doubt on the plea, it is not too late not merely to entertain a change of plea but to send the case back to the magistrate on the basis that, although the plea was unequivocal, Mrs Malik, if believed, did not intend to do what she did do.

In those circumstances I am quite satisfied that quarter sessions exceeded their jurisdiction in the present case and that the magistrate was absolutely right in refusing to re-hear the case. As a result, I will refuse the order of mandamus and allow the order of certiorari to issue.

**MELFORD STEVENSON J:** I agree.

**COOKE J:** I agree.

Solicitors: E Woolf; Treasury Solicitor.

*Order for certiorari.*

T.R.F.B.

HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD GUEST, VISCOUNT DILHORNE AND LORD PEARSON)

9th, 10th February, 24th March 1971

ROWLANDS v HAMILTON

*Road Traffic—Driving with blood alcohol proportion above prescribed limit—Ascertainment of alcohol proportion—‘Ascertainment from laboratory test’—Drink consumed after cessation of driving—Adjustment of test—Road Safety Act, 1967, s 1 (1).*

For the purposes of s 1 (1) of the Road Safety Act, 1967, the proportion of alcohol in the blood of a person driving or attempting to drive a motor vehicle may not be ascertained from a laboratory test for which he subsequently provides a specimen by adjustment of the result of that test in the light of evidence as to the effect of alcohol consumed after driving had ceased and before the specimen was provided. The words in the sub-section ‘as ascertained from a laboratory test’ mean precisely what they say, and excess over the limit can only be established by the test and in no other way, and an adjusted result of a laboratory test cannot be the result as ascertained by the test.

So held by LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD GUEST, and VISCOUNT DILHORNE, LORD PEARSON dissentiente.

APPEAL by Thomas Edward Rowlands, inspector of police at Dunstable, against an order of the Court of Appeal, Criminal Division, allowing the appeal of the respondent, John Edward Hamilton, against his conviction at Bedfordshire Quarter Sessions of driving a motor vehicle on a road having consumed alcohol in such a quantity that the proportion thereof in his blood exceeded the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967.

E F Jowitt QC and Eric Stockdale for the appellant.  
Patrick Bennett QC and S C Desch for the respondent.

Their Lordships took time for consideration.

24th March. The following opinions were delivered.

**LORD REID:** I agree that this appeal must be dismissed. I think that the relevant provisions of the Road Safety Act 1967 are reasonably capable of a construction which would enable this appeal to succeed, but they are at least as capable of a construction which requires the appeal to be dismissed. In my judgment, this is a case of real doubt so that we must adopt the construction most favourable to the accused, leaving it to Parliament, if so advised, to put the matter right.

**LORD MORRIS OF BORTH-Y-GEST:** The point of law which is raised in this appeal concerns the meaning of the words ‘as ascertained from’ in their context in s 1 of the Road Traffic Act 1967. It is an offence under s 1 (1) if a person (a) drives (or attempts to drive) a motor vehicle (b) on a road or other public place (c) having consumed alcohol in such a quantity that the proportion of such alcohol in his blood (as ascertained from a laboratory test for which he subsequently provides a specimen under s 3 of the Act) (d) exceeds the prescribed limit at the time he provides the specimen. In substance the subsection makes it an offence to drive if the blood-alcohol concentration is above the prescribed limit and the subsection makes provision for ascertaining whether or not a person had such a concentration. The ascertainment is by means of a test of a specimen subsequently provided.



The words 'having consumed alcohol' clearly point to a consumption of alcohol before a person ceased (or ceased to attempt) to drive. The sequence indicated by the subsection is that a person consumes alcohol, then drives, and subsequently provides a specimen; the specimen will later be subjected to a laboratory test; the analysis of the specimen will reveal the proportion of alcohol in the blood at the time the person provided the specimen. A person therefore who drives after having consumed alcohol will be guilty of an offence if 'as ascertained from' the laboratory analysis of a specimen which he subsequently provides it is found that the proportion of alcohol in his blood exceeds the prescribed limit at the time he provides the specimen. The specimen must naturally be provided 'subsequently' to the actual time of driving (or attempting to drive), but, as it is by analysis of the specimen that guilt of an offence may be proved, it seems to me to follow that the specimen must be one which has relevance to alcohol consumed before the driving ceased. A test of a specimen provided by a person who has consumed alcohol after he ceased to drive (or ceased to attempt to drive) is not, in my view, a test of a specimen as contemplated by the subsection.

In the present case the respondent was involved in an accident. Being as a consequence much shaken he went into a nearby public house. There he had three whiskies. It was thereafter that he was seen by the police. The usual procedure was subsequently followed. In the result the analyst's certificate disclosed 159 milligrammes of alcohol per 100 millilitres of blood. The course followed by the prosecution at the trial of the respondent at quarter sessions was that they called the licensee of the public house to testify that the respondent had consumed alcohol after the accident to the extent of three single measures of whisky and that they also called a forensic expert (the senior scientific officer of the Home Counties Forensic Laboratory) to give his opinion as to what allowance should be made in respect of the post-accident alcohol consumption and as to whether, after making such allowance, and so displacing the figure of 159 milligrammes, a figure above the prescribed limit would result. In effect he was asked to say what the test would have disclosed had it been of a specimen given after the accident but before the three whiskies were consumed. The expert gave his evidence on the assumption that the respondent's weight at the time of the taking of the specimen exceeded seven stones and presumably he gave his evidence on an acceptance of the evidence given by the licensee. His conclusion was that had there been no post-driving consumption of alcohol the analysis of a specimen would have shown a proportion of alcohol in the blood which exceeded the prescribed limit. On the basis of that evidence the respondent was convicted. His appeal to the Court of Appeal succeeded. Following the decision in *R v Durrant* (1) it was held that the evidence of the forensic expert was not admissible. So the point of law is, therefore, raised whether for the purposes of s 1 (1) of the Act the proportion of alcohol in the blood of a person driving a motor vehicle may be ascertained from a laboratory test for which he subsequently provides a specimen by adjustment of the result of that test in the light of evidence as to the effect of alcohol consumed after driving had ceased and before the specimen was provided.

In my view, in agreement with the judgment of LORD PARKER CJ, the answer should be in the negative. The words 'as ascertained from a laboratory test' point to the conclusiveness of the result of a test. The question whether the proportion of alcohol in the blood exceeds the prescribed limit (at the time a specimen is provided) will be determined 'as' ascertained from the test. The test constitutes the ascertainment and is not merely a step or a process in the course of or at the beginning of the ascertainment. If the test was merely to yield a piece of evidence to which other evidence could be added so that a conclusion could be expressed by a witness (or differing

conclusions expressed by different witnesses) as to the proportion of alcohol in the blood at a time prior to the providing of a specimen then the result would not be ascertained 'from' the test. Furthermore, the test would not be of a specimen referable to the time before driving had ceased. The subsection contemplates that there will be an appropriate specimen (provided as directed by s 3) and that the analysis of that specimen will definitely reveal whether the proportion of alcohol in the blood exceeds the prescribed limit at the time the specimen was provided. There might be cases in which, while it was accepted that someone had consumed alcohol after ceasing to drive, there was considerable conflict in regard to the quantity consumed. The forensic expert or experts would have to express alternative estimates as to what allowances to make in reference to the laboratory test figure based on the various possible views as to what quantity had been consumed and based possibly on various assumptions in regard to the person concerned, and then it would be for the court to do its best to reach a positive conclusion. Such a process of ascertainment would, in my view, be far removed from that which is denoted by the words 'as ascertained from a laboratory test'. I would dismiss the appeal.

**LORD GUEST:** Section 1 (1) of the Road Safety Act 1967 provides:

'If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provides a specimen under section 3 of this Act, exceeds the prescribed limit at the time he provides the specimen, he shall be liable . . .'

The respondent was convicted by a jury under the section at Bedfordshire Quarter Session, but his appeal to the Court of Appeal (Criminal Division) succeeded and his conviction was quashed. The court gave leave to appeal under a certificate in the following terms:

'Whether for the purposes of the Road Safety Act, 1967, s 1 (1), the proportion of alcohol in the blood of a person driving a motor vehicle may be ascertained from a laboratory test for which he subsequently provides a specimen by adjustment of the result of that test in the light of evidence as to the effect of alcohol consumed after driving had ceased and before the specimen was provided.'

On 14th June 1969 the respondent was breathalysed by a police officer and on the test proving positive was arrested and taken to a police station where a blood specimen was taken under the provisions of s 3 (1) of the 1967 Act. This specimen on analysis recorded a proportion of 159 milligrammes of alcohol per 100 millilitres of blood which was 79 milligrammes over the 'prescribed limit' as defined in s 7 (1) of the Act. There was evidence, however, not disputed by the prosecution, that the respondent had consumed three single whiskies after he had ceased to drive and before the blood specimen was taken. Dr Dolan, the analyst who gave evidence for the prosecution, made a calculation expressing the opinion on the basis of certain assumed facts that the three single whiskies which the respondent had consumed would have been responsible for 58 milligrammes of alcohol in the specimen of blood. According to his evidence, even ignoring the amount of whisky consumed after driving had ceased, the blood specimen would still have exceeded the permitted limit of 100 milligrammes by 21 milligrammes. The question is whether on the evidence the jury were entitled to convict the respondent. This question depends entirely on the proper construction of s 1 (1) of the Road Safety Act 1967.

The appellant contends that the adjustment made by Dr Dolan was necessary under s 1 (1) of the Act in order to arrive at the quantity of alcohol in the respondent's blood at the time when he was driving. But this, in my view, is not the proper approach under the section. The critical words of the section are 'as ascertained from a laboratory test' and by s 7 (1) 'laboratory test' is defined as meaning the 'analysis of a specimen [of blood] provided for the purpose'. I will, however, first read the section omitting the critical words:

'If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, . . . for which he subsequently provides a specimen under s 3 of this Act, exceeds the prescribed limit at the time he provides the specimen, he shall be liable . . .'

The section in effect provides that if a 'driver' (I use the word as comprehending a 'person driving or attempting to drive') consumes alcohol to such an extent that when he subsequently provides a blood specimen it is shown to exceed the prescribed limit, he is guilty of an offence. I am sure that the appellant was right in admitting that in the case where the 'driver' consumes alcohol after he ceases to drive, the alcohol content at the time of the test could not be taken without adjustment to allow for the whiskies subsequently consumed. Otherwise, a person might have driven and taken no alcohol before driving, but he would be liable to be convicted if, after he had ceased to drive, he had consumed alcohol which resulted in the blood specimen showing an excess over the prescribed limit. The mischief aimed at by the Act was drinking before driving, not drinking after driving.

For the appellant to succeed it is, therefore, necessary for him to show that the adjustment made to eliminate the post-driving alcohol content could legitimately be made under the section. It is at this point that the words in s 1 (1) 'as ascertained from a laboratory test' become important. Detailed provisions are made in s 3 regarding laboratory tests and 'the prescribed limit' referred to in s 1 (1) is given as the arithmetical proportion of 80 milligrammes of alcohol per 100 millilitres of blood. These provisions make it clear, to my mind, that the Act intended an automatic calculation to be made by means of a chemical analysis as to whether an offence had been committed. It is against the background of the disputes in the courts under the previous Road Traffic Acts as to the effect of alcohol on an individual's capacity to drive that Parliament has in the 1967 Act provided for automatic proof of guilt by the analysis. For Dr Dolan to make the adjustment of the proportions it would be necessary to go outside the 'laboratory test' provided in s 1 (1) and make calculations based on certain assumptions as to the individual concerned and the time factor. It would ultimately depend on the expert opinion of the doctor or chemist. I am convinced that Parliament never intended such calculations to be made and that these calculations would not be justified by the terms of the section. I am not satisfied that the section is ambiguous, but if it were I should unhesitatingly take the construction most favourable to the subject.

We were pressed by the appellant that if the respondent's contention were right it would leave a loophole in the Act through which the 'hip-flask' driver, as he has been described, would escape. This may be so, but if the Act is not watertight then it is for Parliament and not the courts to supply the omission. I am more impressed by the argument for the respondent that if the appellant's argument were sustained it would result in cases such as the present in lengthy arguments and evidence before the court which would not lead to the clarity in which the law should be expressed.

In my view, the Court of Appeal were right in following their own decision in *R v Durrant* (1) and I would dismiss the appeal.

**VISCOUNT DILHORNE:** The answer to the question raised in this appeal depends on the construction to be placed on s 1 (1) of the Road Safety Act 1967. For a person to be convicted of the offence created by that subsection it must be established: (i) that he was driving or attempting to drive a motor vehicle on a road or other public place; (ii) that he was doing so when he had consumed alcohol; and (iii) that the alcohol he had consumed was of such a quantity that the proportion of alcohol in his blood as ascertained from a laboratory test, for which he had provided a specimen, exceeded the prescribed limit at the time he provided the specimen. So it does not suffice to establish that the accused was driving or attempting to drive having consumed alcohol and that the laboratory test, that is to say, the analysis of the specimen provided for the purpose (s 7 (4)), shows the limit to have been exceeded. It has to be shown that the alcohol he had consumed before he ceased to drive or to attempt to drive was of such a quantity that the proportion of alcohol in his blood as ascertained by the laboratory test exceeded the limit at the time he provided the specimen. In *R v Durrant* (1) LORD PARKER CJ, delivering the judgment of the court, said that it seemed to the court that:

'what this subsection is saying is this, that if a person drives a motor vehicle having consumed such quantity that the proportion thereof in his blood, and I add the words "at the time of driving" as ascertained from a laboratory test and so on, exceeds the prescribed limit, he is guilty of an offence.'

I do not think that in view of the words in the subsection 'that the proportion thereof in his blood, as ascertained from a laboratory test . . . exceeds the prescribed limit at the time he provides the specimen' it is permissible to interpolate these words, but perhaps LORD PARKER was merely seeking to emphasise, as must clearly be the case, the close connection there must be between the alcohol consumed before driving ceased and the result of the test.

Where an accused has drunk alcohol after ceasing to drive and before giving the specimen, the result of the test will reflect the consumption of alcohol after driving has ceased. The proportion of alcohol in the blood revealed by it will be partly, and if he had not drunk before stopping driving, wholly due to that. The result of the test will not show that he had before ceasing to drive consumed such a quantity of alcohol as to produce that result. So, unless the case for the prosecution can be supplemented in some way, the fact that an accused has drunk alcohol after ceasing to drive and before giving the specimen will lead to his acquittal even though it be the case that, if he had not done so, the result of the test would have shown that the limit was exceeded. In this case the respondent drank three whiskies after being involved in an accident and before providing a specimen of his blood. In an effort to overcome the difficulty the prosecution called an expert witness who testified to the effect that if the respondent weighed more than seven stones and if he had not drunk the three whiskies, the limit would still have been exceeded. In the light of his evidence the prosecution sought and secured the conviction of the respondent, a conviction which was quashed on appeal.

It will not be possible in every case where a driver has drunk alcohol after ceasing to drive to establish with any degree of certainty the amount of alcohol so consumed. If that cannot be done, no expert will be able to give evidence as to the effect on the proportion of alcohol in his blood of that consumption; and if it can be done, it is

(1) 134 JP 57; [1969] 3 All ER 1357.

not improbable that there would be in many cases a considerable conflict of expert evidence on the question. So if such expert evidence can be given, in effect, to amend the result of the laboratory test, there may still be some who would have been convicted if they had not drunk alcohol after ceasing to drive who will escape conviction and the reception of such evidence may not, owing to possible conflicts between experts, result in a conviction. Allowing the appeal will not, therefore, entirely close the loophole in the Act that now exists. But it would not seem likely that an accused who has been stopped by a police constable who suspects him of having alcohol in his body or of having committed a traffic offence while the vehicle was in motion, and who has failed to pass the breath test, been arrested and taken to a police station, will have had any opportunity of consuming alcohol after he has stopped driving. It is, it would seem, only where he has been involved in an accident and there is an interval of time before the arrival of the police that he will have an opportunity of doing so.

The Road Safety Act 1967 is a penal Act. It must be strictly construed. Unless the language of s 1 (1) clearly permits the introduction of such expert evidence, it must be left to Parliament to legislate to close the gap, if it wishes to do so, a gap which, as I have indicated, will only be partially closed if this appeal is allowed. It is, I think, clear from the terms of the Road Safety Act 1967 and the law at the time it was enacted that the main object of the inclusion of s 1 (1) was to avoid the difficulties that had been experienced in prosecutions under s 6 of the Road Traffic Act 1960. The chief difficulty was in establishing that the accused was unfit to drive through drink or drugs and many were the conflicts between expert witnesses as to the capacity of the accused. The Road Safety Act 1967 made it unnecessary to call expert witnesses by the imposition of an arbitrary standard. No longer was it necessary to prove unfitness to drive. That was to be assumed if the proportion of alcohol in the blood exceeded the prescribed limit. If the proportion of alcohol in the accused's blood 'as ascertained from a laboratory test' exceeded the prescribed limit at the time the specimen was provided, then, unless he had drunk alcohol after ceasing to drive, it followed that he had been driving having consumed such a quantity of alcohol as to produce that result.

But if the appellant is right, it means that expert evidence can again be introduced, and introduced not to show unfitness to drive but to amend the result of the test in the light of the estimated effect of the alcohol consumed after driving has ceased. There appears to be plenty of room for conflicts of evidence on this, and one of the main objects of the Act will be in part defeated. Section 1 (1) prescribes the manner in which the proportion of alcohol in the blood is to be determined. It is the proportion 'as ascertained from a laboratory test'. In my opinion, the Act does not permit of it being ascertained in any other way. The result of the test in this case showed the proportion of alcohol in the respondent's blood at the time the specimen was provided. It did not show that the alcohol consumed before the respondent had ceased to drive was of such a quantity as to produce that result. It clearly was not. The fact that the prescribed limit was exceeded as a result of the consumption of alcohol before driving ceased was established not by the result of the test but by the evidence of the expert witness, and the respondent was convicted not on the result of the test but on his evidence.

In my opinion, the words 'as ascertained from a laboratory test' mean precisely what they say, and excess over the prescribed limit can only be established by the test and in no other way. The language does not, in my view, permit of any other interpretation. If the result of the test, even though it shows the limit to have been exceeded, is not a test of the alcohol in the blood resulting solely from the



consumption of alcohol before driving ceased then there must be an acquittal. I agree with LORD PARKER CJ when he said in *R v Durrant* (1):

'It has been suggested that the words "ascertained from a laboratory test" might possibly be read as "based on a laboratory test" so that one first ascertains the result of the laboratory test and then makes certain adjustments . . . There are great difficulties in reading it that way; "based on" is quite different from "as ascertained from" and in particular bearing in mind the whole object of this Act, which is to cut out evidence and to make the laboratory test conclusive, it would be quite wrong to give it that meaning.'

The adjusted result of a laboratory test is not and cannot be the result as ascertained from the test.

An accused person can submit himself to a urine test or to a blood test. The analysis of a specimen of urine will not of itself reveal the proportion of alcohol in the blood. So it was said that where such a specimen was taken, the Act itself contemplated that the words 'as ascertained from a laboratory test' should not be given a strict interpretation. I do not myself think that this is so. Section 7 (4) of the Act provides:

'For the purposes of this Part of this Act 107 milligrammes of alcohol in 100 millilitres of urine shall be treated as equivalent to 80 milligrammes of alcohol in 100 millilitres of blood . . .'

If the result of the analysis of the specimen of urine shows that it contains more than 107 milligrammes of alcohol per 100 millilitres of urine, then by virtue of s 7 (4) that result itself shows that the proportion of alcohol in the blood was in excess of the prescribed limit. For these reasons, in my opinion, this appeal should be dismissed.

**LORD PEARSON:** This appeal raises a question as to the construction of s 1 (1) of the Road Safety Act 1967. Under the earlier Road Traffic Acts (the Act of 1930, s 15, the Act of 1956, s 9 (1), and the Act of 1960, s 6) it was an offence for a person to be 'driving . . . a motor vehicle . . .' when 'under the influence of drink . . . to such an extent as to be incapable of having proper control' of it. Under those provisions the prosecution would have to prove by witnesses as to facts and sometimes at least by expert witness that the accused was while driving the vehicle under the influence of drink to that extent. Conflicts of evidence, including conflicts of expert evidence, could arise and trials might be protracted and expensive and there might be difficulty in some cases for the prosecution to prove their case and secure a conviction of a person who had in truth committed the offence. Then the Road Traffic Act 1962, by s 1, substituted for the formula '[when] under the influence of drink to such an extent as to be incapable of having proper control of it' as the definition of being unfit to drive a new provision that 'a person shall be taken to be unfit to drive if his ability to drive properly is for the time being impaired'. Section 2 of the Act of 1962 provided that in any proceedings for an offence under s 6 of the Act of 1960 the court should

'have regard to any evidence . . . given of the proportion or quantity of alcohol . . . which was contained in the blood or present in the body of the accused, as ascertained by analysis or measurement of a specimen of blood taken from him with his consent by a medical practitioner, or of urine or breath provided by him, at any material time'

(1) 134 JP 57; [1969] 3 All ER 1357.



and that (in effect) unreasonable refusal by the accused to give a specimen could be put in evidence by the prosecution; and that a certificate of an authorised analyst 'certifying the proportion of alcohol . . . shall be evidence of the matters so certified . . .' Evidently Parliament was seeking to diminish the number of road accidents caused by persons driving while under the influence of alcoholic drinks, and for that purpose was facilitating the proof of the prosecution's case in proceedings against such persons.

Part I of the Road Safety Act 1967 took further steps for the same purposes. Section 1 (1) provided as follows:

'If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provides a specimen under section 3 of this Act, exceeds the prescribed limit at the time he provides the specimen, he shall be liable . . .'

I think it is important to recognise the problem of detail for which a solution had to be found in the structure and drafting of this enactment. The policy was to create a new offence of driving with an undue proportion of alcohol in the blood, which could be proved by an analyst's certificate of the result of a laboratory test, so that the complications of proving that a person was unfit to drive through drink could be avoided. But it would not be possible to prove directly or exactly by such evidence what was the proportion of alcohol in the person's body when he was driving. The specimen to be analysed would be taken some time after he had ceased to drive. The lapse of time would not be negligible, because under s 2 the person would have to submit to a breath test, and if he failed in that test he would be arrested and taken to a police station, and he would be given an opportunity to provide a specimen of breath for a test there, and, if he failed in that test or did not take it, then under s 3 he would be requested to provide a specimen, and apparently a medical practitioner would be required if the specimen was a specimen of blood. The alcohol content of blood changes with the lapse of time.

For the sake of clarity I will now define three stages: Stage (i) is the time before the person ceased to drive. Stage (ii) is the intermediate period between the cessation of driving and the giving of the specimen for analysis. Stage (iii) is the time at which the specimen is provided. The person provides the specimen at stage (iii). The analyst analyses the specimen and certifies the proportion of alcohol in the person's blood at stage (iii), and (say) it is found to be (as in this case) a count of 159 which is in excess of the prescribed limit of 80. That count of 159 is the count at stage (iii). The certificate does not show directly what was the proportion—still less the quantity—at stage (i); it does not relate to stage (i). There has to be an inference as to stage (i); it is an inference of causation—that the proportion at stage (iii) resulted from the quantity at stage (i). If there is no evidence of any alcohol having been consumed by the person in stage (ii), there is an obvious inference (which a reasonable jury could not fail to draw) that in stage (i) the person had consumed alcohol in such a quantity that the proportion of alcohol in his blood as ascertained from the laboratory test was in excess of the prescribed limit at stage (iii) ('at the time he provides the specimen'). Thus, in the case (which is presumably the normal case) of no evidence being given of the accused person having consumed alcohol at stage (ii), no difficulty or complication arises. If, however, there is evidence, whether adduced by the prosecution or by the defence, of the accused person having consumed some alcohol in stage (ii), that raises a doubt, and the prosecution will fail unless it is proved beyond reasonable doubt by further evidence that the inference can still be drawn. As I have said, the inference is that in stage (i) the person had consumed alcohol in such a quantity that

the proportion of alcohol in his blood as ascertained from the laboratory test was in excess of the prescribed limit at stage (i).

In the present case the further evidence was by a senior scientific officer—

‘that in his opinion the blood alcohol level as ascertained from a laboratory test of a specimen of blood provided by the [respondent] must have been above the prescribed limit at the material time even ignoring the alcohol which could then have been in the blood as a result of the undisputed consumption by the [respondent] of three single measures of whisky after the accident and before the taking of the specimen.’

The phrase ‘at the material time’ in that passage must refer to stage (iii). In my opinion, that evidence was rightly admitted and the respondent was duly convicted and the conviction should not have been set aside.

The decision of the Court of Appeal was based on the previous decision in *R v Durrant* (1). In my opinion, there was an error in that decision, and it appears clearly in this sentence from the judgment:

‘As it seems to this court, what this subsection is saying is this, that if a person drives a motor vehicle having consumed such quantity [of alcohol] that the proportion thereof in his blood, and I add the words “at the time of driving” as ascertained from a laboratory test and so on, exceeds the prescribed limit, he is guilty of an offence.’

The error is in adding the words ‘at the time of driving’, implying that the proportion of alcohol in the blood at stage (i) is ascertained from the laboratory test. What is ascertained from the laboratory test is the proportion of alcohol in the blood at stage (iii). From that there is an inference (assisted by evidence, when necessary, as in the present case) that the quantity of alcohol in the blood at stage (i) was such as to produce at stage (iii) a proportion in excess of the count of 80 prescribed as the limit.

I have explained—I hope not at too great length—how I think this rather intricate enactment should be construed. I need only mention, and need not elaborate, the advantage of a construction which gives effect to the manifest intention of Parliament and avoids the absurdity, resulting from the Court of Appeal’s decision, that a driver who has committed the offence can always defeat the enactment and escape just conviction by consuming some alcohol in the period which I have called stage (ii), even if the quantity consumed could not possibly have had any real effect on the position. I would have allowed the appeal.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co; Marcan & Dean.*

G.F.L.B.

(1) 134 JP 57; [1969] 3 All ER 1357.

COURT OF APPEAL (CRIMINAL DIVISION)

(PHILLIMORE AND CAIRNS, LJJ, AND GEOFFREY LANE, J)

28th, 29th January, 26th February 1971

R v MOUNTFORD

*Criminal Law—Forcible detainer—Peaceable entry—Property entered fortified to defeat attempt at eviction—Trial on indictment—Forcible Entry Act, 1429.*

A charge of forcible detainer after peaceable entry is triable on indictment, and on the charge being proved the offence is punishable by imprisonment.

APPEAL by Michael Mountford against his conviction at Lewes Assizes of forcible detainer contrary to the Forcible Entry Act 1429.

V *Levene* for the appellant.

J B R Hagan QC, T M E Nash and D G Knight for the Crown.

*Cur adv vult*

26th February. **PHILLIMORE LJ** read this judgment of the court. The appellant was convicted at Lewes Assizes on 9th July 1970 of the offence of forcible detainer contrary to the Forcible Entry Act 1429 and sentenced to 18 months' imprisonment. At the same time a suspended sentence of 12 months' imprisonment was put into effect so that the effective sentence totalled 30 months. He now appeals against conviction on reference from the full court on a point of law, namely, whether the offence of forcible detainer charged under the Act is triable on indictment.

In July 1969 six houses, 7-12 Wykeham Terrace, Brighton, were empty. They were owned by the Territorial Army which had vacated them with a view to their sale by auction on 23rd July. On Saturday, 19th July, a number of families who had been living in houses in Terminus Road, Brighton, together with supporters coming variously from London and Manchester, moved in and immediately took steps to fortify the properties in Wykeham Terrace to defeat any attempt at eviction. It is not necessary to describe in detail the steps taken in preparation for the defence of the houses save to say that they included the manufacture of petrol bombs and other bombs of a highly explosive character. It is not disputed that the houses were entered peaceably or that the appellant was one of those who entered or that the preparations for defence in which he participated constituted forcible detainer within the meaning of the 1429 Act. The point taken by counsel for the appellant really turns on the construction of the Act. There is, he asserts, no offence of forcible detainer at common law, nor did the 1429 Act create any such offence triable on indictment. Insofar as the Act afforded a remedy for the offence, it did no more than to provide for the restitution of possession to the person dispossessed as a result of what were, in effect, summary proceedings by one or more justices. The court is indebted to counsel for their researches and interesting arguments and also to the office for the immense trouble taken to photostat the vital passages of ancient statutes and of the old commentaries and reports of cases so that we were able to review the whole problem on 28th and 29th January 1971 and to dismiss the appeal. Our reasons may be summarised as follows.

While the construction of the 1429 Act is not entirely easy, we are satisfied that forcible detainer, whether or not it was previously an offence at common law, thereafter became an indictable offence punishable by fine and/or imprisonment. All the commentators from Lambard onwards confirm this and so do some early reports of cases and in particular those tried at Essex Quarter Sessions in the sixteenth

century. There is no record to suggest that the point taken by counsel for the appellant has ever been taken before, and indeed it was not raised in *R v Robinson* (1), where the accused was charged with conspiring to commit the offence of forcible detainer, his appeal being dealt with by this court in July 1970.

Dealing with the problem in more detail, the case as put by the Crown was as follows. As early as 1195 it was proclaimed that knights were to be appointed throughout the country to keep the peace. Ninety years later the statute 13 Edw I c 6 enjoined them to report to the King any crime reported to them. In 1327 a statute (1 Edw III c 16) provided for the selection in every shire of good and lawful men to keep the peace. In 1330 another statute (4 Edw III c 2) provided that those brought before the good and lawful men on indictment were to be imprisoned and the indictments were to be sent to the justices of gaol delivery, i.e., to the High Court judges as they are known today, on the occasion of their visits to the shires. In 1361 the statute known as the Justices of the Peace Act 1361 (34 Edw III c 1) required the justices to fulfil a judicial role themselves, namely, to hear and to determine felonies and trespass on indictment. A few years later in 1388 the justices were required to sit four times a year for such purposes and thus quarter sessions began. It is apparent from the legislation which followed that this was an age of violence, and in particular the ordinary citizen was apt to find himself evicted by force of someone else who coveted his house or land. The likelihood is that the perpetrators of these injustices were in general the barons with their private armies.

This then is the background to the legislation dealing with forcible entry and forcible detainer. However, before dealing with the relevant statutes it is perhaps worth describing briefly the procedure by indictment. Burn's *Justice of the Peace* describes the word 'indictment' as coming from the French word 'enditer', signifying an accusation found by 12 or more on their oath. It is said that an indictment is always at the suit of the King. When found by a grand jury it was called a presentment, or, if found by jurors required to enquire into the particular offence, an inquisition.

I turn now to the vital Acts. The Forcible Entry Act 1381 (5 Ric 2 stat 1 c 7) provided as follows:

'None from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in [peaceable] and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment ...'

It will be observed that under this Act it was no defence that the person guilty of forcible entry was entitled to possession or had a legal right of entry (see the notes in 18 Halsbury's Statutes (3rd Edn) p 406).

Counsel for the appellant rightly concedes that from 1381 the offence of forcible entry has always been an indictable offence. One result of this Act was, however, that if a person who was not entitled to possession entered forcibly, he could remain in possession enjoying the property and detaining it from its true owner until the latter had brought the proceedings necessary for his ejection to a successful conclusion. In order to meet this difficulty and to provide a summary remedy a second Act was passed in 1391, the Statute of Forcible Entry 1391 (15 Ric 2 c 2). It provided as follows:

'The ordinances and statutes, made and not repealed, of them that make entries with strong hand into lands and tenements, or other possessions whatsoever, and them hold with force, and also of those that make insurrections, or

(1) 134 JP 668; [1970] 3 All ER 369.

great ridings, riots, routs, or assemblies, in disturbance of the peace, or of the common law, or in affray of the people, shall be holden and kept, and fully executed; joined to the same, that at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where such force is made; and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice, until they have made fine and ransom to the King; and that all the people of the county, as well as the sheriffs as other, shall be attendant upon the same justices to go and assist the same justices to arrest such offenders, upon pain of imprisonment, and to make fine to the King. And in the same manner it shall be done of them that make such forcible entries in benefices or offices of Holy Church.'

Thus the Act rendered those who entered forcibly and thereafter 'held with force' (i.e., were guilty of what is now called forcible detainer) liable to imprisonment as provided in the Forcible Entry Act 1381 and also provided a summary remedy whereby one or more justices could with the help of the sheriffs and the posse comitatus eject them and cast them into gaol (I quote) 'there to abide conviction by the record of the same justices until they have made fine and ransom to the King'. These words would seem to intend a trial which would normally be at quarter sessions, and indeed the notes in 18 Halsbury's Statutes (3rd Edn) p 407 point out that the usual mode of prosecution is now by indictment, the summary procedure having fallen into disuse.

However, these two Acts did not cover the whole problem and accordingly yet a third Act was enacted, the Forcible Entry Act 1429 (8 Hen 6 c 9). A long preamble to be found in the Statutes Revised sets out the matters with which it was desired to deal and recites the defects in the 1391 Act. It appears that they were threefold: (i) it did not deal with a case where the entry was peaceable but the person who had entered then held the premises by force, i.e., a case such as the present where the only force used was in the detainer of the property from the true owner; (ii) the summary procedure did not provide for the case where the individual who had entered forcibly had decamped before the arrival of the justices; and (iii) no provision was made for punishing a sheriff who did not obey the commandments and precepts of the justices requiring them to execute the provisions of the Act.

The Forcible Entry Act 1429, using the text of the translation in Statutes Revised, went on to provide as follows:

'Our lord the King considering the premisses [i.e. the preamble] hath ordained, that the said statute, and all other statutes of such entries or alienations made in times past, shall be holden and duly executed; joined to the same, that from henceforth where any doth make [any] forcible entry [in] lands and tenements or other possessions, or them hold forcibly, after complaint thereof made within the same county where such entry is made, to the justices of peace, or to one of them, by the party grieved, that the justices or justice so warned, within a convenient time shall cause, or one of them shall cause, the said statute duly to be executed, and that at the costs of the party so grieved . . .'

The court has no doubt that by these words it was intended that the offence of forcible detainer after peaceable entry should be subject to the same punishment as forcible entry itself so as to make such forcible detainer an offence punishable by imprisonment. If so, the procedure must have been by indictment.

The Act then proceeded to extend the summary jurisdiction of the justices to a case of mere forcible detainer and provided that they should have power to restore

possession to the person dispossessed, and also to hold an inquiry in a case where the offender had left the premises before their arrival. Finally the Act proceeded to provide for the punishment of recalcitrant sheriffs, and it is to be observed that in the original Norman French they are described as viscounts. In England the term sheriff had always been used to describe the chief administrator of the earl, whereas the Norman phrase for the count's administrator was viscount—it was often conferred on the count's eldest son and so became an hereditary title. For many years the sheriffdom was also hereditary. It is perhaps not surprising in these circumstances that the sheriff should have been reluctant to help the dispossessed against the dispossessor. In dealing with recalcitrant sheriffs the statute provides:

'And also when the said justices or justice make such inquiries as before, they shall make, or one of them shall make, their warrants and precepts to be directed to the sheriff of the same county, commanding him of the King's behalf to cause to come before them, and every of them, sufficient and indifferent persons, dwelling next about the [lands] so entered as before, to inquire of such entries; . . . And if any sheriff, or bailiff within a franchise having return of the King's writ, be slack, and make not execution duly of the said precepts to him directed to make such inquiries, that he shall forfeit to the King xx li for every default, and moreover shall make fine and ransom to the King.'

This passage seems to indicate that it was for the sheriff to initiate the indictment. In a further passage the Act refers expressly to indictments in the following terms:

'And that as well the justices or justice aforesaid, as the justices of assises, and every of them, at their coming into the country to take assises, shall have, and every of them shall have power to hear and determine such defaults and negligences of the said sheriffs and bailiffs, and every of them, as well by bill at the suit of the party grieved for himself as for the King [to sue] by indictment only to be taken for the King; and if the sheriff or bailiff be duly attainted in this behalf by indictment, or by bill, that he which sueth for himself and for the King have the one moiety of the forfeiture of xx li. together with his costs and expences; and that the same process be made against such persons indicted or sued by bill in this behalf, as should be against persons indicted or sued by writ of trespass done with force and arms against the peace of the King.'

These words are clearly referring to criminal procedures such as we know today and not to any form of summary process, or, of course, of civil process.

The court is satisfied that from 1429 onwards the offence of forcible detainer has always been triable under the terms of the Act. If confirmation were needed it is only necessary to turn to the conclusions of many learned lawyers. It would be superfluous to list all the passages from the works of all of them. It is sufficient, since they all point in favour of the Crown, to refer only to a few passages. Counsel have cited passages from Lambard's *Eirenarcha* (1602, p 149) and Dalton's *Country Justice* ((1742), pp 449, 550) which affords an example of an indictment for forcible detainer under the 1429 Act, and also to the edition of 1645, p 193, which treats forcible detainer equally with forcible entry as the subject of prosecution on indictment. Blackstone's *Commentaries* (1830, vol 4, p 148) and Hawkins's *Pleas of the Crown* (1720, vol 2; (1795), vol 2, both treat forcible detainer as triable on indictment in exactly the same way as forcible entry. Comyn's *Digest* (1822, vol 4, p 344) and also Burn's *Justice of the Peace* (1869), p 591 are to the same effect. The latter is interesting in that it suggests that both offences were triable at common law and gives an example of an indictment laid both under common law and under the Act. Archbold's *Pleading and Evidence in Criminal Cases* (1825, p 340) again gives an example



of an indictment for forcible detainer based solely on the statute. Russell on Crime (12th ed.) emphasises that forcible detainer is triable on indictment, as does the modern edition of Archbold. It is perhaps worth referring to Corner's Crown Practice (1844, pp 249, 256). Thanks to the appointment held by its author this is clearly a work of great authority. In it forcible entry and forcible detainer are, in effect, dealt with as like offences.

Turning to reports of decided cases it would seem unnecessary to cite more than a few. The records of Essex Sessions of the sixteenth century carry a number of reports of prosecutions for forcible entry. They include cases of straight forcible entry and disseisin as those brought against Anthony Coldewell and Thomas Letton (1), also of forcible entry followed by forcible detainer such as that brought against Henry and John Kente and others (2) and yet another for a similar offence against William Pullen and others (3) who appear to have ejected the vicar of Highesterne from his house and then detained it. The rolls contain a number of similar cases, for the most part punished by fine.

It is true that most of the cases charge forcible entry with or without forcible detainer, but it is perfectly clear that the latter was in itself an indictable offence. In 1603 the rolls record the prosecution of Sir William Fitz-Williams and others (4) for a straight offence of forcible detainer of what is described as a capital messuage. It appears that this case was removed into the Queen's Bench on demurrer to the indictment in which it had not been alleged that the entry had been made peaceably 'as the usual course is where an indictment is forcible detainer'. It appears, however, that the indictment was upheld and sent back to Essex Quarter Sessions for disposal. It does not appear what was the final result, but the importance of the case is that it is a clear instance of forcible detainer following peaceable entry being held indictable.

The court thinks that both forcible entry and forcible detainer were probably offences at common law involving, as they did, breaches of the peace. It would be odd if it was an offence to break down a gate and take possession of a field, but not an offence if one found the gate open and so entered and then barred and held it against the true owner. There is no substance in this appeal. Forcible detainer has been an offence triable on indictment for at least 500 years, and accordingly and for these reasons the court has dismissed the appeal.

*Appeal dismissed.*

*Solicitors: Registrar of Criminal Appeals; Director of Public Prosecutions.*

G.F.L.B.

(1) (1566) unreported.

(2) (1567), unreported.

(3) (1567), unreported.

(4) (1603), Cro Eliz 915, Cro Jac 19.

<b>MAGISTRATES</b> – Committal to quarter sessions for sentence – Application to change plea of guilty. <b>R v Mutford and Lotheringland Justices. Ex parte Harber. R v East Suffolk Quarter Sessions. Ex parte Harber</b> .. .. .	<b>QBD</b>	<b>107</b>
<b>MAGISTRATES</b> – Irish warrant – Endorsement – No inquiry whether prima facie case made out – Habeas corpus – Likelihood of prosecution or detention for political offence – Backing of Warrants (Republic of Ireland) Act, 1965, s 1 (2) (b). <b>R v Brixton Prison Governor. Ex parte Keane</b> .. .. .	<b>QBD</b>	<b>38</b>
<b>MAGISTRATES</b> – Natural justice – Magistrate acting in administrative or executive capacity – Duty to act openly, impartially and fairly – Seizure of sweet potatoes by local authority officer – Meeting between justice and local government officials before hearing – Box of sweet potatoes shown and sample cut open – Retirement at end of hearing of magistrate with public analyst and chief veterinary officer – Advice received, but not communicated to defendants – Food and Drugs Act, 1955, s 9 (3) – Colouring Matter in Food Regulations, 1966, reg 5 (1). <b>R v Birmingham City Justices. Ex parte Chris Foreign Foods (Wholesalers) Ltd</b>	<b>QBD</b>	<b>73</b>
<b>QUARTER SESSIONS</b> – Appeal – Plea – Change of plea – Enquiry whether plea of guilty at magistrate's court equivocal – Right to remit case to magistrate – Quarter sessions entitled to consider only what happened before magistrate – Nothing in proceedings before magistrate casting doubt on plea. <b>R v Marylebone Magistrate. Ex parte Westminster City Council. R v Inner London Quarter Sessions. Ex parte Westminster City Council</b> .. .. .	<b>QBD</b>	<b>239</b>
<b>RACE RELATIONS</b> – Housing – Council houses – Tenants restricted to British subjects – Validity – Action for declarations by local authority – Competency – Race Relations Act, 1968, s 2 (1), s 19 (10). <b>London Borough of Ealing v Race Relations Board</b> .. .. .	<b>QBD</b>	<b>131</b>
<b>RATING</b> – Machinery and plant – Generation of power – Electric motors, hydraulic pumps, and air compressors – Motive power derived from electricity supplied to factory – Hydraulic and pneumatic power distributed throughout factory – Rating and Valuation Act, 1925, s 24 (1), Sched 3 (1) (a) – Plant and Machinery (Rating) Order, 1960, Sched. <b>Chesterfield Tube Co Ltd v Thomas (Valuation Officer)</b> .. .. .	<b>CA</b>	<b>1</b>
<b>RENT CONTROL</b> – Contract referred to tribunal – Entry upon consideration of reference – Papers considered by each member of tribunal individually – Assembly and visit to view premises – No admission obtained – Letter of withdrawal – Not operative till received by tribunal – Rent Act, 1968, s 73 (1). <b>R v Tottenham District Rent Tribunal. Ex parte Fryer Bros (Properties) Ltd</b> ..	<b>QBD</b>	<b>94</b>
<b>ROAD TRAFFIC</b> – Driving test – Duty of examiner appointed by Ministry. <b>British School of Motoring Ltd v Simms and Another, Stafford Third Party</b> ..	<b>Assizes</b>	<b>103</b>
<b>ROAD TRAFFIC</b> – Driving while disqualified – Outstanding offences taken into consideration – Similar offence. <b>R v Jones</b> .. .. .	<b>CA</b>	<b>36</b>
<b>ROAD TRAFFIC</b> – Driving with blood alcohol proportion above prescribed limit – Arrest without warrant – Powers of police to detain thereafter – Road Safety Act, 1967, ss 1, 2 (2), 2 (4), 3 (1), 4. <b>R v Mackenzie</b> .. .. .	<b>Assizes</b>	<b>26</b>
<b>ROAD TRAFFIC</b> – Driving with blood alcohol proportion above prescribed limit – Ascertainment of alcohol proportion – 'Ascertainment from laboratory test' – Drink consumed after cessation of driving – Adjustment of test – Road Safety Act, 1967, s 1 (1). <b>Rowlands v Hamilton</b> .. .. .	<b>HL</b>	<b>241</b>
<b>ROAD TRAFFIC</b> – Driving with blood alcohol proportion above prescribed limit – Provision of specimen – Blood – Analysis by ordinary equipment and skill – Gas chromatography. <b>Smith v Cole</b> .. .. .	<b>QBD</b>	<b>97</b>
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – Specimen for laboratory test – Failure to supply – Reasonable excuse – Excuse relating to blood specimen only – Liability to supply specimen of urine – Direction to jury – Road Safety Act, 1967, s 3 (3) (6). <b>R v Harling</b> .. .. .	<b>CA</b>	<b>29</b>
<b>STATUTE</b> – Construction – Purposive interpretation – Act providing minimum sentences for specified criminal offences. <b>Kennedy v Spratt</b> .. .. .	<b>HL</b>	<b>203</b>
<b>TOWN AND COUNTRY PLANNING</b> – Compulsory purchase – Compensation – Assessment – Application of Pointe Gourde principle to cases under Land Compensation Act, 1961, s 6 (1), Sched 1, part 1. <b>Wilson v Liverpool City Council</b> .. .. .	<b>CA</b>	<b>168</b>

<b>TOWN AND COUNTRY PLANNING</b> – Compulsory purchase – Compensation – Reference to Lands Tribunal – Agreement between parties as to basis of assessment – Subsequent decision of House of Lords that that basis wrong – Power of court to remit case to tribunal – Discretion.		
<b>Wilson v Liverpool City Council</b> .. .. .	CA	168
<b>TOWN AND COUNTRY PLANNING</b> – Permission – Refusal – Appeal to Minister – Decision in accordance with general policy – Need for genuine consideration of particular matter – Town and Country Planning Act, 1962, s 179 (1) (3) (b).		
<b>H Lavender and Son Ltd v Minister of Housing and Local Government</b> .. .. .	QBD	186
<b>TOWN AND COUNTRY PLANNING</b> – Permission – Refusal – Authority required to purchase land – Compensation – Assessment.		
<b>Margate Corporation v Devotwill Investments Ltd</b> .. .. .	HL	19
<b>TRADE DESCRIPTIONS</b> – Defence – ‘Mistake’ – ‘Act or default’ – Offence due to conduct of employee – Trade Descriptions Act, 1968, s 24 (1) (a).		
<b>Birkenhead and District Co-operative Society Ltd v Roberts</b> .. .. .	QBD	194
<b>TRADE DESCRIPTIONS</b> – False description – Milk – Foil cap on bottle accurately describing milk and bearing retailer’s name – Names of milk suppliers to whom bottle belonged embossed on bottle – Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1).		
<b>Donnelly v Rowlands</b> .. .. .	QBD	100
<b>TRADE DESCRIPTIONS</b> – False description – Sale of second-hand car – False number of miles on indicator – Defence – Reliance by defendants on information supplied to them – Act or default of another person – Failure to take all reasonable precautions or exercise all due diligence – Trade Descriptions Act, 1968, s 24 (1) (a), (b), (3)		
<b>London Borough of Richmond v Motor Sales (Hounslow) Ltd</b> .. .. .	QBD	236

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In the next forthcoming parts of the Justice of the Peace Reports will be published the two recent important decisions of the House of Lords in **W v W** (adoption: refusal of consent) and **Tesco Supermarkets Ltd v Natrass** (trade description: supervision of branch employees).

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**QUEEN'S BENCH DIVISION**

(LORD PARKER, CJ, MELFORD STEVENSON AND COOKE, JJ)

9th February 1971

**HARMAN v WARDROP**

*Road Traffic—Driving with blood-alcohol proportion exceeding prescribed limit—Attempting to drive—Car stopped by person wrongly believed by defendant to be police officer—Ignition keys handed over—Departure of defendant from car—Return—Demand for handing back of keys—Refusal—Subsequent breath test—Road Safety Act, 1967, s 1 (1).*

The appellant, while driving his car, was stopped by a person in uniform, the defendant wrongly believing that that person and another person who accompanied him were police officers. In that belief the appellant handed over his ignition keys to the person who had stopped him, got out of his car, and walked a short distance to a motor van, on seeing which he realised that the person who had stopped him and his companion were not police officers. He returned to his car and demanded the return of his keys, which was refused. Meanwhile, the police had been fetched by one of the men, and on the arrival of two police constables the appellant was given by them a breathalyser test, which proved positive. The appropriate procedure was followed, and an analysis of the appellant's blood showed that the proportion of alcohol therein substantially exceeded the prescribed limit. On appeal against the appellant's conviction of driving with a blood-alcohol proportion exceeding the prescribed limit, contrary to s 1 (1) of the Road Safety Act, 1967,

**HELD:** the appellant, having been effectively prevented from driving was not driving within the meaning of s 1 at the time when the breath test was administered, and, therefore, the conviction must be quashed.

**Semble:** the mere request by the appellant for the return of his keys did not amount to an attempt to drive.

**CASE STATED** by Hertfordshire justices.

The appellant was convicted at Bishop Stortford Magistrates' Court of driving a motor vehicle with a blood-alcohol proportion exceeding the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967. He appealed against that conviction, the ground of appeal being that at the time when the breath test was administered he was not a person driving a motor vehicle on a road within the meaning of the subsection.

*J Wadsworth* for the appellant.

*P Beaumont* for the respondent.

**THE LORD CHIEF JUSTICE:** This is an appeal by way of Case Stated from a decision of justices for the county of Hertford sitting at Bishop's Stortford who convicted the appellant of an offence contrary to s 1 (1) of the Road Safety Act 1967.

At 2.30 am on 26th June 1970 the appellant was driving his motor car at Sawbridgeworth when he was signalled to stop by a man named Corsby, who was wearing a uniform which made the appellant think that he was a police constable. In fact, Corsby was not a constable. Having stopped the appellant, Corsby asked him if he had had anything to drink and the appellant replied: 'Yes, I've had one or two.' Corsby then told him to switch off his engine and hand over the ignition keys, and, thinking that Corsby was a police constable, he complied. Thereafter he got out of the car, left it, and walked a short distance to a motor van which he found bore a label, Rent-A-Dog. He then realised that Corsby and his companion were not police officers, and asked for the ignition keys to be returned. That request was refused. Corsby's companion [Cassel] had meanwhile gone to fetch the police. About five or

ten minutes later two police constables arrived, and, being told by Corsby that drink was suspected, they gave the appellant a breathalyser test. The usual procedure was followed and the analyst's certificate disclosed 132 milligrammes of alcohol.

The sole question was whether at the time when the constables gave the breathalyser test it could be said that the appellant was either driving or attempting to drive. The magistrates in convicting him said:

'We were of the opinion that, as the appellant did not stop his car voluntarily, thinking that Corsby, who had signalled him to stop, was a police constable, and as he gave Corsby his keys still in the belief that Corsby was a police constable, but asked for their return as soon as he realised that Corsby and Cassel were not police constables, he remained a person "driving a motor vehicle on a road" until such time as the police administered a breath test.'

Accordingly, they convicted.

I find it impossible to say that the appellant was driving at the time when the test was administered, as it seems to me that he was effectively prevented from driving. He had got out of the driver's seat. He had for one reason or another handed over the ignition keys to somebody else and when he asked for the ignition keys he could not get them back. Accordingly, it seems to me impossible to say, as the magistrates said, that he was still driving. The only doubt I have is whether it could be said that, although not driving, he was attempting to drive in that he had asked for the keys with the intention of driving the car. That was not a ground upon which the magistrates decided the case, and for my part I very much doubt whether merely asking for the keys to be returned could be said to amount to an attempt to drive, although it was no doubt a preparatory act with the intention of driving. For my part I very much doubt whether until he got the keys back, and he never did, it could possibly be said that the appellant was attempting to drive. For those reasons I would allow the appeal.

**MELFORD STEVENSON J:** I agree.

**COOKE J:** I agree.

*Conviction quashed.*

Solicitors: Sharpe, Pritchard & Co, for Nockolds & Son, Bishop's Stortford: J A G Royce, Ware.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, MELFORD STEVENSON AND COOKE, JJ)

11th February 1971

SMITH v WOOD

*Highway—Gipsy—Encamping without lawful authority or excuse—Meaning of 'encamp'—Highways Act, 1959, s 127 (c).*

By s 127 (c) of the Highways Act, 1959: 'If, without lawful authority or excuse . . . (c) a hawker or other itinerant trader or a gipsy pitches a booth, stall or stand, or encamps, on a highway, he shall be guilty of an offence . . .'

'Encamps' in this subsection means setting up a camp, and does not include living in a camp.

Where, therefore, the appellant had been convicted in a magistrates' court on informations alleging that he, without lawful authority or excuse, being a gipsy, encamped on a highway, contrary to s 127 (c), and the informations related to dates after the appellant had placed his caravan on a lay-by and, having been warned, had failed to move,

**HELD:** the appellant had not encamped within the meaning of the subsection, and the conviction must be quashed.

CASE STATED by justices for the county of Kent.

Informations were preferred at Tonbridge Magistrates' Court by the respondent, George Wood, a police officer, against the appellant, James Horace Smith, alleging that on fourteen days in November 1969, the appellant, without lawful authority or excuse, being a gipsy, encamped on a highway, contrary to s 127 of the Highways Act 1959. The informations related to dates after the appellant and others had placed caravans on a lay-by used by the Kent County Council for storing materials, and, having been warned by the county council, had failed to move. The justices overruled a submission that there was no case to answer based on the contention that the offence of encamping provided by the section related to the single act of setting up a camp. They convicted the appellant, who appealed.

*Lord Gifford* for the appellant.

*Michael Parker* for the respondent.

**LORD PARKER CJ:** This is an appeal by way of Case Stated from a decision of justices of the county of Kent sitting at Tonbridge, who convicted the appellant, James Horace Smith, on fourteen informations alleging that on fourteen days in November 1969 he, without lawful authority or excuse, being a gipsy, encamped on a highway, contrary to s 127 of the Highways Act 1959.

It appears that the appellant and others, all of whom were gipsies, stationed caravans on a rough surfaced lay-by which in fact was used by the Kent County Council for the storage of road-making materials. When they first came to the lay-by and stationed their caravans there it is not stated, but it was prior to any of the dates alleged in the informations. In other words the informations related to days when the gipsies were already there, and, having been warned, had failed to move. A submission was made that there was no case to answer in that the offence related to the single act of setting up a camp, and, as the camp had already been set up, it was said that none of the informations laid was in respect of an offence against the Act. The justices held that there was a case to answer. The appellant elected not to give evidence, and as a result of and in the light of the argument on the submission and thereafter the justices convicted the appellant.

Section 127 of the Highways Act 1959 provides as follows:

'If, without lawful authority or excuse—(a) a person deposits on a made-up carriageway, or on any highway which consists of or comprises a made-up



carriageway within fifteen feet from the centre of that carriageway, any dung, compost or other material for dressing land, or any rubbish, or (b) a person deposits any thing whatsoever on a highway to the interruption of any user of the highway, or (c) a hawker or other itinerant trader or a gipsy pitches a booth, stall or stand, or encamps, on a highway, he shall be guilty of an offence and shall be liable in respect thereof to a fine not exceeding 40 shillings,'

a fine which now by amendment may be £50.

The point taken on behalf of the appellant before the justices was that whereas 'encamped' may denote either setting up a camp or living in a camp, yet in its context in s 127 it only means the former. The argument is that every one of the actions referred to in this section as constituting an offence are single acts—a person deposits, a hawker or other itinerant trader or a gipsy pitches a booth, stall or stand are all single acts constituting an offence, and are not continuing offences. Accordingly it was said that 'encamp' in this context must refer to the single act of setting up a camp. The justices rejected that argument, thinking that there was, as it were, a dichotomy between pitching, which they agreed was a single act, and encamping, which denoted in their view a continuing act of living or lodging in a camp, and so, since the appellant was on each of the days alleged in these informations living in a camp, they convicted him.

I prefer the argument raised on the part of the appellant. Granted that 'encamp' may mean one of two things, either setting up a camp or living in a camp, in this context it seems to me that it can only mean the former. The dichotomy, as it is said here, is not between the single act of pitching a booth and a continuing act of encamping, but a dichotomy between pitching a booth, which is for the purposes of selling a commodity, and encamping, which is for the purpose of residing. In each case it seems to me that the section contemplates the single act of pitching the booth, stall or stand, or the single act of setting up a camp. Counsel for the respondents has referred to the fact that this is highly inconvenient for the local authority, that there would in these circumstances be no provision for dealing with a gipsy who, having encamped, continued to camp, and the most that he could suffer originally was a fine of 40 shillings, now increased to £50. I quite appreciate that that may produce difficulties for local authorities, but it cannot, in my judgment, affect the plain construction of this section. It is to be observed, moreover, that under the recent Caravan Sites Act 1968, it is, by s 10, made an offence for a gipsy to station a caravan on a highway for the purpose of residing for any period, and it provides for a penalty on summary conviction and after conviction for further penalties for each day that the offence is continued thereafter. It is true that that section at the moment does not apply at Kent, because it only applies in what is referred to as an area designated, but by s 12 the Minister may, on the application of any local authority, designate an area to which s 10 shall apply, although it is to be observed that he is debarred from doing so unless satisfied that the local authority have already made adequate provision for the accommodation of gipsies residing in or resorting to their area.

It is a very short point, but I have come to the conclusion here that, inconvenient as it may be for the local authorities, on the true construction of the section the offence here is not a continuing offence but a single act. Accordingly, I would allow this appeal and quash the conviction.

**MELFORD STEVENSON J:** I agree.

**COOKE J:** I agree.

*Appeal allowed.*

Solicitors: Peter Kingshill; Sharpe, Pritchard & Co, for A C Staples, Maidstone.

T.R.F.B.

### HOUSE OF LORDS

(LORD HAILSHAM OF SAINT MARYLEBONE, LC, LORD MACDERMOTT, LORD HODSON,  
LORD GUEST AND LORD DONOVAN)

25th, 26th, 27th, 28th January, 1st, 2nd, 3rd February, 24th March 1971

Re W (an infant)

*Adoption—Consent—Dispensing with consent—Unreasonable withholding—What is unreasonable—Adoption Act, 1958, s 5 (1) (b).*

By s 5 (1) (b) of the Adoption Act, 1958, the court may dispense with the consent to an adoption order of a parent or guardian of the infant required by s 4 (1) (a) of the Act 'if it is satisfied that the person whose consent is to be dispensed with . . . cannot be found or is incapable of giving his consent or is withholding his consent unreasonably'.

'Unreasonably' in s 5 (1) (b) is not to be read as necessarily importing any element of culpability, callous indifference, or failure to discharge parental duties. The test of the conduct of the parent or guardian, which is an objective and not a subjective test is purely whether it is reasonable in all the circumstances of the case. The welfare of the child is a relevant, but not a decisive, factor in considering the question of reasonableness. Sentimentality, romanticism, prejudice, caprice, and lack of common sense, can, when carried to excess, amount to unreasonableness. This issue is not to be decided against a parent on considerations which lack substance or are in doubt.

APPEAL by the foster parents and proposed adopters of the infant W against an order of the Court of Appeal, reported p 42 ante, allowing an appeal by the respondent, the mother of the child, against an order permitting the adoption of the child by the appellants, made at Shoreditch County Court. The county court judge then dispensed with the respondent's consent to the adoption on the ground that it had been unreasonably withheld.

*A R Campbell QC and Anita Ryan for the appellants.*

*I H M Jones QC and A M Hill for the respondent.*

Their Lordships took time for consideration.

24th March. The following opinions were delivered.

**LORD HAILSHAM OF ST. MARYLEBONE LC:** This appeal concerns the future of a male child, W, who was born on 28th March 1968. Like all cases in which the contest is between foster parents and a natural parent, all perfectly sincere in their motives, of which there have been quite a number in recent years, the decision is one which must cause pain in whichever direction the dispute is resolved and in any tribunal charged with the decision must cause anxiety and a deep sense of responsibility. I feel constrained to express my sympathy with the parties and to say that one of the pleasanter features of this case has been that each has treated the other with a measure of consideration and compassion and behaved with a respect for the interests of the child not universally shown in cases of this kind.

The case falls to be decided under the terms of the Adoption Act 1958. It is a proposal for the adoption of W by the foster parents, the present appellants, with whom W has resided since a few days after his birth, and it is resisted by the infant's mother, the respondent to the present appeal. The nature of the proceedings thus distinguishes the case at the outset from cases decided in the course of matrimonial disputes or for the guardianship of infants where the main issues relate to guardianship, custody or control. In the latter group of cases, the duty of the court is defined by s 1 of the Guardianship of Infants Act 1925, which directs the court that it shall 'regard the welfare of the infant as the first and paramount consideration'.

In proposals for adoption, however, such as that in question here, the duty of the court is defined by s 7 (1) of the Adoption Act 1958 in markedly different terms. Under that Act, before making an adoption order the court is directed that it

'shall be satisfied—(a) that every person whose consent is necessary under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights; (b) that the order if made will be for the welfare of the infant . . .'

Thus, in custody cases the welfare of the child is the first and paramount consideration, but in adoption proceedings the welfare of the child is the second of three separate conditions as to each one of which the court has to be separately satisfied, and the first of which is that the consent of the parent must be forthcoming at the time of the hearing unless the consent has been validly dispensed with by the court under the other provisions of the Act.

The difference, it need hardly be said, is due to the different nature and effect of the orders sought in the two classes of case. In custody cases what is in question is the custody, care, or control of the child, or perhaps the administration of his property, and that is why his interest is the first and paramount consideration. But in adoption cases, what is in issue is the parent-child relationship itself and in that relationship the parent as well as the child has legitimate rights. Under s 13 (1) of the Adoption Act 1958, on an adoption order being made:

'all rights, duties, obligations and liabilities of the parents . . . in relation to the future custody, maintenance and education of the infant . . . shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid . . . the infant shall stand to the adopter exclusively in the position of a child born . . . in lawful wedlock.'

The new relationship extends even to the adoptive parents' right to give or withhold consent to marriage and serves to bring the adoptive brothers and sisters within the prohibited degrees of matrimony. The result is that in the Adoption Act 1958 Parliament has enacted provisions for the protection of natural parents the normal effect of which is to enable the natural parent to veto an adoption order unless one of the exceptions which it provides enables the court to dispense with parental consent. The argument in this case revolves very largely round one of these exceptions.

Had the test of adoption been the welfare of the infant, there is no doubt that the order must have been made. In discharge of his duty under s 7 (1) (b) of the Act the county court judge made the finding that the proposed adoption was for the infant's welfare and he described this finding as 'inevitable'. The Court of Appeal did not disturb it, and, as will be seen, largely founded their judgment on it. Counsel for the respondent candidly and, as he clearly had no choice, properly agreed that this finding was unassailable. Equally unassailable was the fact that the parental consent was not in fact forthcoming. The respondent had signed a consent form before the hearing, but, as she was fully entitled to do, later withdrew it in an undated letter received some time in March 1969 and has never resiled from this position. It followed that no adoption order could be made despite the finding as to welfare, unless the county court judge was entitled to dispense with the respondent's consent. This the learned judge purported to do, and made an adoption order at an adjourned hearing in July 1969. The first, and principal, question in the appeal from this

decision was, and is, whether he was, and is, entitled to dispense with the mother's consent in this way. Holding that he was not, the Court of Appeal discharged the order for adoption. The matter now comes before your Lordships' House.

The power to dispense with the consent of a parent in adoption proceedings is contained in s 5 of the 1958 Act. The conditions in which the court may exercise this power are defined in sub-ss (1) and (2) in the following terms:

'(1) The court may dispense with any consent required by paragraph (a) of subsection (1) of section four of this Act [this includes the consent of a parent] if it is satisfied that the person whose consent is to be dispensed with—(a) has abandoned, neglected or persistently ill-treated the infant; or (b) cannot be found or is incapable of giving his consent or is withholding his consent unreasonably.

'(2) If the court is satisfied that any person whose consent is required by the said paragraph (a) has persistently failed without reasonable cause to discharge the obligations of a parent or guardian of the infant, the court may dispense with his consent whether or not it is satisfied of the matters mentioned in subsection (1) of this section.'

The only one of these provisions on which the county court judge was asked to rely in order to dispense with the respondent's consent in the instant case was the concluding phrase of s 5 (1) (b). He was asked to hold, and in the event held, that the consent of the respondent to the proposed adoption was being withheld 'unreasonably'. A great deal of the argument in the Court of Appeal revolved round the meaning of this apparently simple word. Two of the lords justices, SACHS and CROSS LJJ but, significantly, not RUSSELL LJ felt themselves constrained to give the word a construction which the appellants contended to be wholly contrary to the plain language of the Act. Subsequent to the decision of the instant case in the Court of Appeal in *Re B (an infant)* (1), a differently constituted Court of Appeal (DAVIES, WINN and KARMINSKI LJ) expressed a view wholly inconsistent with that of SACHS and CROSS LJJ in the instant case. This divergence within the Court of Appeal would, in itself, be sufficient to justify the present appeal to your Lordships' House. To this divergence I must turn first.

The relevant test prescribed by the Act of 1958 is that the withholding of consent by the parent must be 'unreasonable'. SACHS LJ interpreted this word as involving necessarily a degree of what he described as 'culpability'. Counsel for the appellants had no difficulty in establishing that much of SACHS LJ's judgment is based on this interpretation. He said: 'Only if there is culpable conduct by the true parents can they [i.e. the foster parents] step in without the consent of the latter.' In his view the test is whether the mother has been 'guilty of conduct culpable to quite a high degree' and, he says:

'That such conduct must be culpable is, of course, clear from the analysis of the relevant provisions of the 1950 Act by JENKINS LJ in *Re K* (2) . . .'

If this had been indeed a fair analysis of the judgment of JENKINS LJ in *Re K*, I should have no difficulty in holding that such an interpretation is quite inconsistent with the words of the Act of 1958. Unreasonableness is one thing. Culpability is another. It may be that all or most culpable conduct is unreasonable. But the converse is not necessarily true. I have no difficulty in preferring the interpretation of DAVIES LJ who, in criticising the judgment of SACHS LJ in the instant case, said, referring to the terms of s 5 (1) (b) set out above:

(1) [1970] 3 All ER 1008.

(2) 117 JP 9, 28; [1952] 2 All ER 877; [1953] 1 QB 117.

'It seems to me that the section draws a clear distinction between the cases covered by sub-ss (1) (a) and (2) on the one hand and those covered by sub-s (1) (b) on the other. The former are examples of misconduct towards the child; the latter are not, save insofar as it could be said to be misconduct unreasonably to withhold consent. If a person cannot be found, he could not in the ordinary case be said to be guilty of misconduct or, to use the word adopted by SACHS LJ in *Re W* (1), to be culpable on that account, any more than would a person who is incapable of giving his consent. And I for my part can see no justification for colouring the third case covered by sub-s (1) (b), namely the unreasonable withholding of consent, with any conceptions to be drawn from sub-s (1) (a) or (2) and not to be found in the first two cases covered by sub-s (1) (b). To put it in another way, the two subsections do not, in my judgment, deal with seven examples of improper but similar conduct, they do not constitute a genus, and the cases covered by sub-s (1) (b) are not in *pari materia* with the others. However difficult it may be in any individual case to decide whether the withholding of consent is unreasonable (even though, as is plain on the authorities and as was admitted in the present case by counsel for the mother, the test of reasonableness is an objective one), the problem is not rendered any easier by the substitution of some other and different word for "unreasonably" or "unreasonable". Indeed, to do so serves only to render the problem more difficult and to give the statute a meaning which its words do not bear.'

I expressly endorse this criticism and am fortified by the reflection that it also expressed the strongly worded views of WINN LJ who said:

'I have stressed the apparent absence of any indication of blame from the wording of s 5 (1) (b) of the Act—unless, of course, blame is to be considered to be imputed by the adverb "unreasonably"—because I have in mind certain judicial observations to which it will be necessary to refer. Leaving aside for the moment the possible implications of this word "unreasonably" it can, I think, be accepted that the mere fact that a person cannot be found is not normally indicative of his being at fault, in any respect whether in relationship to some infant or in any other respect; of course, many persons who cannot be found have deliberately gone into hiding and if they are hiding are probably guilty in some respect, but it does not follow that this is why they are missing. Equally it must be conceded that many people become incapable of intelligently choosing whether to give or withhold consent for physical reasons for which they cannot be held responsible. Accordingly it does not seem to me that the subject-matter of the subsection comprises any genus by reference to which any implication can be raised that the final phrase "is withholding his consent unreasonably" should be expected to import any misconduct or blameworthiness. If and insofar as it is legitimate at all to draw from the scope of the subsection any inference of intention that all persons to whom it applies should have something in common with one another, I cannot myself envisage any possible common element other than, perhaps, a concept of unavailability for the court of any useful guide whenever it has to deal with a factual situation where no consent of a parent of an infant is forthcoming to satisfy the primary requirement of the Act. Plainly if the parent cannot be found or is mentally defective there will be such an absence of consent; may it be legitimate to regard the concluding words of the subsection as contemplating any case in which, albeit there is a refusal of consent, that refusal can be treated judicially as nugatory because it has been asserted without any reasonable basis?'

(1) p 42 ante.



In my view, there is no reason for interpreting the word 'unreasonably' where it occurs in the statute as importing necessarily any element of culpability.

In a supporting judgment CROSS LJ uttered views which, although not identical with, are vulnerable to the same criticism as, those of SACHS LJ. Quoting and purporting to follow a passage from the judgment of DIPLOCK LJ in *Re C (an infant)* (1) he says:

'Finally there is *Re C*. In that case DIPLOCK LJ expressed the view that to come within the words a mother must at least display "a self-indulgent indifference" to the welfare of her child. That accords entirely with my view ...'

In a later passage CROSS LJ says:

'The whole question [sic], as I see it, is whether by March 1969 [the respondent] had acquiesced for so long in her child being cared for by the [appellants] ... that to retract her consent in March displayed, to use DIPLOCK LJ's words "self-indulgent indifference" to the welfare of the child and, so far as it is relevant, self-indulgent indifference to the feelings of the [appellants].'

To my mind, this is to apply a criterion quite different from the plain words of the Act, and insofar as DIPLOCK LJ's words can be read as construing 'unreasonable' where it occurs in s 5 (1) (b) of the Adoption Act 1958 as necessarily involving on each occasion conduct amounting to 'callous or self indulgent indifference' I do not think they can be relied on. I hasten to add that I do not think DIPLOCK LJ was construing the Act in this way. In the following paragraph he went on to quote LORD DENNING MR in *Re L (An Infant)* (2) (in a passage I shall be quoting shortly) and said that he thought he had been doing no more than repeating in rather more emphatic words LORD DENNING's statement of the law in that case.

If I may again refer to the judgment in the differently constituted Court of Appeal in *Re B* (3), I accept and endorse the criticism of the judgments of SACHS and CROSS LJ in the judgment of WINN LJ where he says:

'I feel constrained diffidently to express my dissent from any suggestion that it is necessary to show that the refusal of a parent to consent to the adoption of his or her child involves any culpable conduct on the part of that parent in order to establish that such refusal was unreasonable; in my own quite definite opinion a parent may be entirely free from blame and in no respect culpable nor justifiably to be reproached in refusing consent to an adoption and yet it may in the judgment of the court be quite unreasonable to refuse such consent. It follows that I cannot associate myself with the observations of CROSS LJ in that case where he is reported as having said: "... all these considerations lead me to think that the section envisages a degree and standard of unreasonableness which although not amounting to positive misconduct with regard to the child does not fall far short of it ... 'shutting your eyes to a blameworthy degree to the very serious consequences which your refusal of consent will almost certainly entail for your child' ...'

In seeking to support the decision of the Court of Appeal, counsel for the respondent was constrained to suggest a third, and, to my mind, equally objectionable, reading of s 5 (1) (b) on the same lines, and in these terms: 'A parent should only be deprived

(1) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(2) (1962), 106 Sol Jo 611.

(3) [1970] 3 All ER 1008.



of his parental rights if he has failed in his parental duty or if it is probable that he will do so in the future.' To my mind, this is yet another attempt to improve on the language of the Act of Parliament. Section 5 (1) (b) lays down a test of reasonableness. It does not lay down a test of culpability or of callous or self-indulgent indifference or of failure or probable failure of parental duty. As the last words in sub-s (2) make quite clear, the tests in s 5 (1) (b) are quite independent of the test in s 5 (2), on which counsel has to some extent plainly modelled his submission. It is not for the courts to embellish, alter, subtract from, or add to words which, for once at least, Parliament has employed without any ambiguity at all. I must add that if the test had involved me in a criticism of the respondent involving culpability or callous or self-indulgent indifference, I might well have come to the same conclusion on the facts as did SACHS and CROSS LJ. But since the test imposed on me by the Act is reasonableness and not culpability I have come to the opposite conclusion.

The question then remains as to how to apply the correct test. The test is whether at the time of the hearing the consent is being withheld unreasonably. As LORD DENNING MR said in *Re L* (1):

'In considering the matter I quite agree that: (i) the question whether she is unreasonably withholding her consent is to be judged at the date of the hearing; and (ii) the welfare of the child is not the sole consideration; and (iii) the one question is whether she is unreasonably withholding her consent. But I must say that in considering whether she is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable; but still it may be unreasonable for her to withhold consent. We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case.'

This passage was quoted with approval by DAVIES LJ in *Re B* (2), by LORD SORN in *A B and C B v X's Curator* (3), by PEARSON LJ in *Re C* (4), and by WINN LJ in *Re B*. In my view, it may now be considered authoritative. In the words of LORD SORN in *A B and C B v X's Curator*:

'It appears from his note that the sheriff-substitute envisaged two alternative ways of approaching the question; the first being to make the welfare of the child the sole, or primary, consideration; the second being to ignore the welfare of the child altogether. He chose the second alternative... As I see it, neither of these alternative ways of approaching the question is right. The proper way to approach the question is to look at the matter from the point of view of the parent and, having regard to the whole circumstances, to ask whether the parent's decision to withhold consent was an unreasonable decision for the parent to have made.'

LORD SORN then went on to quote LORD DENNING MR in the passage from *Re L* (1) which I have quoted above.

From this it is clear that the test is reasonableness and not anything else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness, and reasonableness in the context of the totality of the circumstances. But, although welfare per se is not the test, the fact that a reasonable parent

(1) (1962), 106 Sol Jo 611.

(2) [1970] 3 All ER 1008.

(3) 1963 SC 124.

(4) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it.

I do not understand *Re K (an infant)* (1) as deciding anything different from what I have said. I specifically endorse the often quoted passage from JENKINS LJ, in which he said:

'Prima facie it would seem to me eminently reasonable for any parent to withhold his or her consent to an order [for adoption] thus completely and irrevocably destroying the parental relationship. One can imagine cases short of such misconduct or dereliction of duty as is mentioned in s. 3 (1) (a) [of the Adoption Act 1950] in which a parent's withholding of consent to an adoption might properly be held to be unreasonable, but such cases must, in our view, be exceptional.'

Exceptional, yes. But the test is still reasonableness, or its opposite, and reasonableness, or its opposite, must be judged, as RUSSELL LJ observed in the instant case, and as both counsel agreed, by an objective (as distinct from a subjective) test. Indeed, I cannot myself readily visualise circumstances in which the words 'reason', 'reasonable' or 'unreasonable' can be applied otherwise than objectively. And, be it observed, 'reasonableness' or 'unreasonableness' where either word is employed in English law, is normally a question of fact and degree, and not a question of law, so long as there is evidence to support the finding of the court. It seems to me that the passage in JENKINS LJ's judgment in *Re K (an infant)* immediately following that which I have quoted above is too often forgotten and deserves to be better remembered. He said:

'It is unnecessary, undesirable and, indeed, impracticable to attempt a definition covering all possible cases of that kind. Each case must depend on its own facts and circumstances.'

In my opinion, besides culpability unreasonableness can include anything which can objectively be adjudged to be unreasonable. It is not confined to culpability or callous indifference. It can include, where carried to excess, sentimentality, romanticism, bigotry, wild prejudice, caprice, fatuousness, or excessive lack of common sense.

This means that, in an adoption case, a county court judge applying the test of reasonableness must be entitled to come to his own conclusions on the totality of the facts, and a revising court should only dispute his decision where it feels reasonably confident that he has erred in law, or acted without adequate evidence, or where it feels that his judgment of the witnesses and their demeanour has played so little part in his reasoning that the revising court is in a position as good as that of the trial judge to form an opinion. In my view, by imposing the necessity for a clear prognosis of lasting damage to the child RUSSELL LJ was falling into the same error as the other lords justices in applying to the Act a criterion of construction different from that which the language of the Act in fact prescribes.

I only feel it necessary to add on this part of the case that I entirely agree with RUSSELL LJ when he said in effect that it does not follow from the fact that the test is reasonableness that any court is entitled simply to substitute its own view for that of the parent. In my opinion, it should be extremely careful to guard against this error. Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.

The question in any given case is whether a parental veto comes within the band of possible reasonable decisions and not whether it is right or mistaken. Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no court should seek to replace the individual's judgment with his own.

In coming to its decision on the facts it seems to me, as it did to LORD SORN (1), that the court must have regard to the totality of the evidence. No doubt there are factors in the scale which in any given case must weigh comparatively little, and all three lords justices in the Court of Appeal were surely correct in discounting, or in treating extremely lightly, the young mother's alleged vacillation in circumstances of considerable difficulty and stress, and over a comparatively short space of time, or the undoubted pain which a transfer of W back to his mother would cause in this case to the appellants, and, in many cases, and perhaps in this, to disregard almost completely a mere difference in material circumstances. All the same it is to the totality of the relevant circumstances that the court should look in coming ultimately to the decision that withholding consent is or is not unreasonable, and in my opinion it is extremely dangerous merely because a factor weighs little or nothing in the circumstances of a particular case, or of most particular cases, to argue from that, that it should not be 'put into the scales' at all, or that because a totality of inconclusive factors taken individually weigh little, to weigh them collectively is, as it were, to add nought to nought and produce a digit. The ancient fallacy of the sorites is at least as dangerous a trap to the unwary as that which leads one to argue that  $0+0=1$ .

In the instant case, all three members of the Court of Appeal came to the conclusion that the learned county court judge had erred in law, and if so, of course, his judgment could not stand and the decision might well be at large. It is this criticism of the county court judge's judgment which now falls to be considered. The criticism was, that, though he may have disclaimed the intention to do so, the county court judge was in fact falling into the first of the two errors categorised by LORD SORN (1) that is, making the welfare of the child the sole or primary consideration. RUSSELL LJ said:

'Taking the case as a whole I cannot escape the conclusion that the judge's decision went entirely on his view as to the best interests of the child, notwithstanding his self-reminder that on this point that was not the sole consideration.'

If so, the county court judge would have fallen into the first of the two errors condemned by LORD SORN in the passage I have already quoted. SACHS LJ came to the same conclusion:

'Having, with these matters in mind, read and reread with anxious care the judgment delivered in the instant case, it seems clear that taken as a whole it is what might be called a "welfare" judgment in which there has been followed step by step a welfare report of a welfare officer.'

CROSS LJ said the same thing:

'In deciding as he did in this case, the judge, in my view, applied the wrong test. The question which he asked himself was: "Am I satisfied that the making of the adoption order will promote the welfare of this child?" and not, as I think that it should have been: "Am I satisfied that making every proper allowance for the difficulty in which [the respondent] finds herself, she, in refusing her consent, is failing to face up to the realities of the case and is shutting her eyes to a blame-worthy degree to the obvious dangers to which she is exposing the child?"'

I was at first impressed by this criticism of the county court judge's judgment. But I am now satisfied that it is mistaken. At the beginning of his judgment the county court judge correctly cites the passages in *Re C* (1), to which I have already referred, in which PEARSON LJ correctly quotes the passage from LORD DENNING MR in *Re L* (2). After that he says:

'Well, with that guidance, I approach this case. One of the things one has to consider, *but not the sole consideration*, is the welfare of the child. It must be clear, judging whether the [respondent] is reasonably or unreasonably withholding consent, that one must look at the matter objectively.'

The italics are mine. Assuming that he applied this test conscientiously and had material on which to found his findings I do not see how this statement of law can be attacked.

It is, of course, true that in the following two pages of counsel's note of the judgment the learned judge analysed the facts mainly from a welfare standpoint. But this he was bound to do. Not only was he bound to do so from the point of s 7 (1) (b) which is not mentioned from this viewpoint by the Court of Appeal, but he was bound to do so in order to apply to the facts of the case before him LORD DENNING's injunction in *Re L* (2): 'In considering whether she [the mother] is reasonable or unreasonable we must take into account the welfare of the child.' What appears to me to clinch the matter in favour of the county court judge is the last page of the judgment as noted by counsel:

'Doing the best I can—I find this case difficult—looking at the matter quite dispassionately and saying what should a reasonable mother do in these circumstances—consent or refuse consent—I take the view, getting the guidance I can from the cases—that the reasonable mother should consent in all the circumstances of this case. It is inevitable—it must be the best for the welfare of the child. In all the circumstances I feel she is unreasonably withholding consent in this case. I order that her consent should be dispensed with.'

Counsel for the appellants pointed out—in my opinion unanswerably—that this passage and, in particular, the use of the word 'difficult' must refer to the disputed issue under s 5 (1) (b), the question whether the respondent was unreasonably withholding her consent, and not the question, obviously considered by the judge indisputable as to the welfare of the child. In these circumstances I find it impossible to agree with the Court of Appeal that the county court judge had misdirected himself, or that the judgment was simply an assessment based on the false criterion of the infant's welfare to the exclusion of all else.

It is my opinion that in making this decision the county court judge had adequate material to justify this finding. The child was conceived against the respondent's intentions. The respondent put him out for adoption within days of his birth and had never seen him again before the hearing. Although the genuineness of her emotions were not questioned, the depth of her feeling for W was, as the guardian ad litem pointed out, open to doubt. In her own words at the hearing he was a 'total stranger' to her. By another man she had had two other illegitimate children to cope with, at the hearing aged respectively four and three. There was no male member of the household but she relied solely on an uncle 'who visits me. He would provide male influence'. She was living solely on public assistance, and, although she hoped at an unspecified time to work in a factory, she could not do so in the reasonably foreseeable future. She was, at the time of the hearing, 23 years of age. She

(1) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(2) (1962), 106 Sol Jo 611.

hoped to get married at some time but, as the county court judge pointed out, her chances of doing so (if any) would be sadly diminished by the advent into the household of a third illegitimate child. There was no chance of her marrying the father of W who had left her when she became pregnant and could not be traced. She depended for help on the assistance of her female cousin, aged 26, living with her but without any ascertainable obligation to remain and on her mother and sisters living locally. Having seen her, the learned judge formed the opinion that there was a grave risk that she would form a new connection with a man whose relationship might well involve another unwanted child. It is at least probable that she would hardly remain indefinitely organising her life as she was doing, and quite a number of unpredictable factors were almost certain at one time or another to upset the precarious balance of the household of which she was the centre and which the arrival of her third child would at least to some extent still further imperil. Her inner resources were of doubtfully adequate strength to enable her to cope with the manifold difficulties which the addition of the third child would inevitably bring. The guardian ad litem whose report was unchallenged said:

'She feels guilt about not having [W] with her and regrets not being able to come to a decision earlier. Her mother and three sisters live locally and she tells me that they give her support and material help. [The respondent] impresses me as a warm, though unstable, young woman whose behaviour in the past has been inconsistent. It could be that her change of heart is motivated by her own needs and some sentimentality, and not by the best interests of the infant.'

The guardian ad litem also came to the following conclusions about future prospects:

'I am in some difficulty in making a recommendation to the court. I feel that [the respondent] could offer her child a good home and could be a good mother. However one would expect the infant to be emotionally affected by a change and I rather doubt if [the respondent] would have the emotional resources to deal with such difficulties. Her motives are genuine and yet one doubts how deep her feelings are for the child after a year without contact.'

By contrast the two appellants are evidently deeply attached to W. They are the only parents, and theirs is the only home, that W has ever known. In the words of the guardian ad litem:

'[The appellants] are an extremely pleasant, happily married couple. [She] is a warm, maternal woman and impresses me as more outgoing than her husband. [He] is a quiet, kindly man. Both came from large families themselves and are obviously very fond of children. The infant has been in the [appellants'] care for a year and has been well accepted by their adopted daughter and by members of the extended family. He has made good progress with the [appellants] and they are very attached to him. Both [appellants] are very upset at the [respondent's] change of heart.'

Obviously, in a case without medical evidence it is necessary to be extremely careful in assessing any possible danger to the child from uprooting it from this stable and happy family atmosphere and plunging it into the uncertainties of the respondent's precarious menage. But, in my opinion, the county court judge was well entitled, after assessing the respective parties, whom he had seen, to come to the conclusion which he reached, that:

'This child is now some 16 to 17 months old. There is no doubt to my mind—there is no medical evidence about it but I must be entitled to know it—inevitably

it seems to me that to remove a child from the only home it has known and to put it in care of a stranger would, I think, not only disturb the child emotionally and cause untold tears and unhappiness and there might be psychological disturbance as well. There is no medical evidence before me but it seems to me that one is entitled to take it into consideration as (pertaining to) the welfare of the child.'

This seems to me to be a conclusion to which he was entitled to come, and I do not think it is open to us to disturb this finding. Speaking for myself I find more than a little sympathy with the expert witness in *Re B* (1) who was asked in general words, but in a somewhat similar connection:

'What then would you expect if you had first of all a stable home—and there I am including stable parents and home—and transfer to an unstable one?'

and his answer was 'Disaster'. In the present case disaster, if it came, would extend not merely to W, but to the respondent herself, her other children, and perhaps even other members of her family. It is at least arguable that, in the circumstances of the present case, the respondent's consent was being unreasonably withheld.

I do not think it necessary to form an opinion definitely on what I would myself have done had I been placed at first instance in the extremely difficult position of the county court judge. I only desire to add that, having read his judgment and, making allowance for the fact that it was oral, *ex tempore*, and preserved only in counsel's excellent contemporary note, I see little reason to suppose that my decision would necessarily have been different from his. He was entitled to say and did say on the totality of the material before him that the consent had been unreasonably withheld and that he dispensed with it, and once he had dispensed properly with the parental consent on the facts of this case the adoption order followed automatically, since the second and third of the two conditions imposed by s 7 were admittedly satisfied. In the words of LORD DENNING MR quoted above: 'Her anguish of mind is quite understandable. But still it may be unreasonable for her to withhold consent.'

In the result my opinion is that the appeal be allowed and the order of the county court judge restored. Both parties being legally aided there should be the necessary taxations.

**LORD MACDERMOTT:** The boy to whom this appeal relates was born on 28th March 1968. He is the third child of the respondent who is an unmarried woman, now about 24 years of age. Her two older children, aged approximately five and four, are the daughters of a man who is not the father of the boy. On 5th April 1968, the boy, when just over a week old, was placed with the appellants who are husband and wife and registered foster parents. On 31st January 1969, the appellants applied to the Shoreditch County Court for an adoption order in respect of the boy. The respondent had given her written consent to this adoption on 11th February 1969, but she withdrew this consent during the following month and maintained her non-consenting attitude throughout the proceedings which followed. The appellants' application came before the county court on 1st April 1969 and after several adjournments, in the course of which both the appellants and the respondent obtained legal aid, was finally heard and determined on 17th July 1969. His Honour Judge Willis then made the adoption order sought by the appellants. In doing so it is clear from the notes of his judgment that he had arrived at two conclusions: first, that the proposed adoption was the best course for the welfare of the boy; and, secondly, that the respondent mother's consent which, by s 4 (1) (a) of the Adoption Act 1958, was a condition precedent to the making of an adoption order, should be



dispensed with under the powers conferred on the court by s 5 (1) (b) of the same Act (hereinafter referred to as 'the Act') because it was being withheld by her 'unreasonably'. On appeal by the mother, the Court of Appeal (RUSSELL, SACHS and CROSS LJJ) set aside the adoption order, and it is from this decision that the appellants now appeal to your Lordships' House.

Section 7 (1) (b) of the Act provides that the court before making an adoption order shall be satisfied 'that the order if made will be for the welfare of the infant'. What I have referred to as the learned judge's first conclusion was enough to meet this requirement, and counsel for the respondent conceded that if this conclusion fell to be considered alone, the evidence was sufficient to sustain it. It was on the learned judge's second conclusion, namely, that the mother's consent should be dispensed with as 'unreasonably' withheld, that issue was joined and that the Court of Appeal found his decision to be wrong in law and without evidence to support it. Before I turn to the considered judgments of the Court of Appeal, it will be convenient to set out the material subsections of s 5. They provide:

'(1) The court may dispense with any consent required by paragraph (a) of subsection (1) of section four of this Act if it is satisfied that the person whose consent is to be dispensed with—(a) has abandoned, neglected or persistently ill-treated the infant; or (b) cannot be found or is incapable of giving his consent or is withholding his consent unreasonably.

'(2) If the court is satisfied that any person whose consent is required by the said paragraph (a) has persistently failed without reasonable cause to discharge the obligations of a parent or guardian of the infant, the court may dispense with his consent whether or not it is satisfied of the matters mentioned in subsection (1) of this section.

'(3) Where a person who has given his consent to the making of an adoption order without knowing the identity of the applicant therefor subsequently withdraws his consent on the ground only that he does not know the identity of the applicant, his consent shall be deemed for the purposes of this section to be unreasonably withheld.'

With these provisions should be read s 13 (1) of the Act which, in so far as material, enacts:

'Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant . . . shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock . . .'

I turn now to the judgements of the Court of Appeal to see why that court reversed the decision of the county court. RUSSELL LJ has this to say:

'The question whether a parent's consent is unreasonably withheld is not to be solved merely by a view formed by a court, or by a child welfare officer, or a man or woman in the street that life with the proposed adopters would be, if I may use the phrase, a better bet for the child. This truism must be clearly appreciated by any who may interest themselves in cases such as the present case. Were it otherwise the Act would have allowed consent to be dispensed with whenever the adoption order would in the view of the court be in the best interests of the child.'

My Lords, I read this passage as meaning that the mere fact that an adoption will be for the welfare of the child does not of itself necessarily show that a parent's

refusal to consent to that adoption is unreasonable, but not as implying that such a refusal, when viewed in the light of all the circumstances relevant to the child's welfare, cannot amount to an unreasonable withholding of consent. So read I would respectfully accept this passage as a general proposition. Then RUSSELL LJ adds:

'Taking the case as a whole I cannot escape the conclusion that the judge's decision went entirely on his view as to the best interests of the child, notwithstanding his self-reminder that on this point that was not the sole consideration. It is, of course, right to say that there may be cases in which the circumstances related to the welfare of the child are such that no mother acting reasonably should withhold consent to the adoption; but it seems to me that this requires a clear prognosis of relative harm to the child if the adoption order is not made. An "exceptional case" as was said by this court in *Re K (an infant)*, *Rogers v Kuźmicz* (1), approving *Hitchcock v W B* (2). Just because one mother in particular circumstances acting reasonably would give consent, it does not mean that another mother in the same circumstances would act unreasonably in refusing consent. The test is objective, but reasonable people may adopt different attitudes and arrive reasonably at different conclusions in similar circumstances.'

The first part of this passage I understand as meaning that the county court judge's finding of unreasonableness was based on no more than his view that the proposed adoption would be for the boy's welfare. I shall return to this aspect of the matter later when examining the nature of the county court proceedings, and I pause now only to observe that one finds here RUSSELL LJ's first reason for differing from the county court judge—he had applied the wrong test. The second part of the passage deals with the meaning of the words 'withholding his consent unreasonably', when applied in relation to the welfare of the child, by confining them to the sort of case where there is 'a clear prognosis of relative harm to the child if the adoption order is not made'. That indicates RUSSELL LJ's second reason—if the proper test had been applied the mother's conduct was not unreasonable. The conclusion reached by RUSSELL LJ is expressed in these words:

'In summary I am of the opinion that while this is a case in which a mother might reasonably consent to the proposed adoption, it is also a case in which the court should not be satisfied that a mother would be acting unreasonably in withholding her consent.'

SACHS LJ adopts a more extreme test of unreasonableness in withholding consent. He concludes, on a consideration of earlier decisions and what he refers to as the 'penal' consequences of adoption for a parent, that the test of unreasonable conduct is that it must be culpable. CROSS LJ follows a rather different approach but one which also finds a special meaning for 'unreasonably'. He says:

'Assuming for a moment that there is no authority the other way, all these considerations lead me to think that the section envisages a degree and standard of unreasonableness which although not amounting to positive misconduct with regard to the child does not fall far short of it.'

Then, he continues:

'Finally there is *Re C* (3). In that case DIPLOCK LJ expressed the view that to come within the words a mother must at the least display a "self-indulgent

(1) 117 JP 9, 28; [1952] 2 All ER 877; [1953] 1 QB 117.

(2) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.

(3) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

indifference" to the welfare of her child. That accords entirely with my view, although I am not altogether sure that I would have thought that on the facts the mother's attitude in that case satisfied that test.'

My Lords, if SACHS and CROSS LJ were right in the views they expressed as to the meaning of 'unreasonably' it would, in my opinion, follow that the present appeal must fail, for, whatever else may be said of the respondent, I do not think it can fairly be found, on the material before us, that the withdrawal of her consent was 'culpable' or 'blameworthy' or not far short of 'positive misconduct', or that it evinced 'a self-indulgent indifference'.

The question, therefore, becomes one of construction. What is the true meaning and scope of the words of s 5 (1) (b), 'or is withholding his consent unreasonably'? It will be convenient, first of all, to consider the words in their natural meaning and statutory setting, and then to discuss the principal decisions. There is no definition in s 5 or elsewhere of 'unreasonably' save to the very limited extent provided for by sub-s (3); and nowhere in the text can I find anything to import into 'unreasonably' the qualifying expressions adopted by SACHS and CROSS LJ in this case. It is true that, under s 5 (1) (a) and (2), consent can be dispensed with on grounds descriptive of misconduct of a grave kind. But, in my view, neither the *ejusdem generis* rule nor any other rule of grammar or construction can give 'unreasonably' a complexion derived from those parts of the context I have just mentioned. One might as well say that the expression 'cannot be found' in s 5 (1) (b) meant that the person concerned had gone into hiding or was keeping out of the way.

Turning from the immediate context in which 'unreasonably' occurs to the policy and intent of the Act, I discern nothing in this broader survey to warrant reading into 'unreasonably' all or any of the reprehensible elements attributed to the word by SACHS and CROSS LJ. But the Act lays down three fundamental concepts which cannot be left out of account if the word 'unreasonably' is to be applied and proved as Parliament intended. These are to be found in s 4 which provides that (subject to the powers conferred by s 5) there can be no adoption without the consent of the parents; in s 13 (1) which makes adoption an irreversible process whereby the rights and obligations of parenthood are extinguished and transferred to the adopters; and in s 7 (1) (b) which says that adoption is to be for the welfare of the infant.

These provisions, by their very nature, show that Parliament cannot have contemplated that the process of adoption would be such as to allow the relationship of parent and child—the blood tie—to be sundered lightly and without good reason. One may therefore assume that it would be contrary to the intention of the Act if a finding of unreasonableness were to be reached on some trivial issue or on grounds which were not clearly established and of substance. Where the natural strength and inherent virtues of the parental bond continue to exist, they must be anxiously regarded in weighing the circumstances relevant to the question of unreasonableness. They are too important and the consequences of adoption too final to let it be otherwise. But, that said, it is also to be noted that these factors are not always present or present to the same extent; and, further, that they will often be best assessed without too much emphasis being placed on purely emotive considerations. It is to be remembered that the statutory process of adoption in English law is aimed at meeting a social need which involves children as well as parents, and that it starts, in the ordinary course, not with the child being taken from his parents because some authority thinks he would be better off if they were changed, but because he has been offered for adoption by his parents (or one of them) or by some person or body acting on their behalf. This is not to say that consent once given may not be retracted, for the legislature has otherwise ordained; but it does, I think, add to the difficulty of reading the word 'unreasonably' in a special sense which includes some degree

of blameworthiness. The statutory process does not seem to have a place for such a special meaning or to offer any reason for putting the adopter at the end of the proceedings (including the necessary period of custody) in a position in which, if he is to succeed, he must undertake the additional onus of proving the parent in some way culpable as well as being just unreasonable. And lastly, the word 'unreasonably' in s 5 (1) (b) must, in my view, be read as indicating an objective test, if only to provide a relatively stable criterion for the exercise of the dispensing power. But if culpability or blameworthiness is to be an added factor, the objectivity of the test will diminish, if it does not disappear, and the yardstick will, in effect, vary from case to case.

My Lords, for these reasons my tentative views based on the Act itself may be thus summarised: (i) in s 5 (1) (b) the word 'unreasonably' is to be construed according to its natural significance and not as importing words of guilt or misconduct such as 'culpable', 'blameworthy' or 'a self-indulgent indifference'; (ii) so construed, the test for deciding whether consent has been withheld unreasonably is to ask what a reasonable parent, placed in the position of the parent in question, would do; (iii) the test is objective; (iv) in general, the provisions of the Act require that a finding of unreasonableness should be based on grounds which are well established and of substance, and (v) in particular, where the test of unreasonableness falls to be applied in relation to the welfare of the child, the degree of unreasonableness to be proved must be marked in the sense that the parent, whose consent is withheld, has ignored or disregarded some appreciable ill or risk likely to be avoided, or some substantial benefit likely to accrue if the child is adopted.

My Lords, having arrived at these provisional views, I now proceed to see how far they are supported by or run counter to authority. I do not think any useful purpose would be served by attempting an exhaustive list even of such of the cases as has been fully reported. Instead, I shall endeavour to make a selection of those which offer some guidance on the construction of s 5 (1) of the Act or bring to notice a matter which I hope may justify the length of this opinion, and that is the emergence of two distinct and conflicting schools of judicial thought on this very question. Of these, as we have seen, the school followed by SACHS and CROSS LJ in this case (though not, I think, by RUSSELL LJ) favours a special construction of the word 'unreasonably'. The other school favours what I may call the natural construction.

I start with the decision of the Queen's Bench Division (LORD GODDARD CJ, HILBERY and DEVLIN JJ) in *Hitchcock v WB* (1). The question there, which arose on a Case Stated by justices, was whether on the evidence the justices were right in law in holding that the father of a boy of two years who had been proposed for adoption had 'unreasonably withheld' his consent. On the report I find it hard to form a clear view of the merits of the decision which was in the father's favour, but that is by the way and I need not recite the facts. The court was obviously impressed with the grave and permanent nature of an adoption order which, as LORD GODDARD described it, 'is an order of the most serious description', and the unanimous conclusion at which the court arrived was undoubtedly influenced by this consideration. The following paragraph from LORD GODDARD's judgment shows his view of the principle involved:

'But the mere fact that the adoption order will be for the benefit of the child does not answer the question whether consent is being unreasonably withheld. I am not going to attempt, because it would be a most dangerous thing to do, to lay down in general terms what would amount to the unreasonable withholding of consent, for circumstances in this life are so various, but with regard to the present case, I do say that when once the justices find that a man has an

(1) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.

honest desire to remain the parent of his child, and that he is working properly and satisfactorily so that he has money which he can contribute to the upkeep of the child, although he may have to put the child into some form of institution, if all these circumstances exist I can see no reason why a father can be said to be acting unreasonably if he says, "Good as it might be for my child to be adopted and looked after by somebody else, I am not prepared that my child should be removed entirely out of my life and no longer be a member of my family and that I should be as if I had never had the child at all".

HILBERY and DEVLIN JJ agreed, and the pith of the latter's judgment is, I think, to be found in these words:

"The prima facie conclusion can, of course, be displaced, but the burden of so displacing it lies on those who assert that the refusal is unreasonable. If they can bring evidence before the court which shows that his prospects of providing a home are quite illusory and that there is no real chance of it, that would be a matter to be taken into consideration. Again the test is the same: a father might say, "I want my child and I think that I can find a home for it," but if an answer, a satisfactory answer to the minds of the justices is, "You want your child but, having regard to the difficulties with which you are faced and having regard to your own past record and your own situation you will never be able to provide a home for him or bring him up as you ought and, you should realize, as a reasonable man, that it is in his best interests that you should part with him altogether," then the presumption of reasonableness is displaced."

I see no reason for thinking that this decision was reached on what I have referred to as the special construction, or that it does anything to displace the natural construction. *Re K (an infant)*, *Rogers v Kuzmicz* (1), comes next. It was cited in this case with approval by SACHS and CROSS LJ as well as by RUSSELL LJ. It came to the Court of Appeal (SOMERVELL, JENKINS and HODSON LJ) on an appeal in an adoption matter from the county court which had decided that the mother's consent had been unreasonably withheld. The Court of Appeal reversed the order, being of opinion that the finding of unreasonableness could not be sustained in law. The judgment of the court was delivered by JENKINS LJ who expressed complete agreement with the decision and reasoning in *Hitchcock's* case (2) and, in a reference to s 3 (1) (a) of the Adoption Act 1950 (which corresponded closely with s 5 (1) (a) of the 1958 Act) said:

"One can imagine cases short of such misconduct or dereliction of duty as is mentioned in s. 3 (1) (a) in which a parent's withholding of consent to an adoption might properly be held to be unreasonable, but such cases must, in our view, be exceptional."

Much has been founded on this passage but I cannot read it or the rest of the judgment as going the length of saying that 'unreasonably' connotes a culpable or reprehensible attitude on the part of the parent withholding consent. While JENKINS LJ stressed the drastic consequences of adoption it is, I think, clear that he was content to construe 'unreasonably' according to its ordinary meaning. This, however, was not the view taken by SACHS LJ in this case, for he is reported as saying:

"That such conduct must be culpable is, of course, clear from the analysis of the relevant provisions of the 1950 Act by JENKINS LJ in *Re K* (1), his reference to the need to establish something not far short of the highly culpable offences

(1) 117 JP 9, 28; [1952] 2 All ER 877; [1953] 1 QB 177.

(2) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.

referred to in s 5 (1) (a) of the 1958 Act, and the view expressed that the cases in which it can be held established must be "exceptional".

With great respect I think this is a misreading of what JENKINS LJ meant to convey for he spoke of cases 'short of' and not of cases 'not far short of' the statutory references to culpable conduct; and I very much doubt if 'exceptional' was ever meant to suggest 'culpable' or something akin thereto. 'Exceptional' is a word of experience and may be appropriate at one period without remaining so. For my own part, I find no difficulty in imagining a parent who is clearly 'withholding his consent unreasonably', but who deserves none of the epithets that some of the judgments now under review would attach to that expression.

The next case I must mention is *Re L (An Infant)* (1), a decision of the Court of Appeal (LORD DENNING MR, DONOVAN and PEARSON LJ) on 18th July 1962. It is reported in "The Times" of 19th July 1962, and we have been furnished with a transcript of the judgments. Again, the issue was whether a mother's withholding of consent was unreasonable. The court affirmed the decision of the county court judge that it was. I need not go into the facts for the importance of the case lies in the following passage from the judgment of LORD DENNING:

'In considering the matter I quite agree that: (1) the question whether she is unreasonably withholding her consent is to be judged at the date of the hearing; and (2) the welfare of the child is not the sole consideration; and (3) the one question is whether she is unreasonably withholding her consent. But I must say that in considering whether she is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable; but still it may be unreasonable for her to withhold consent. We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case.'

The last sentence puts in a nutshell what I have termed the natural construction, and it seems to have been acceptable to the other members of the court.

In *A B and C B v X's Curator* (2) the same question of what was meant by 'unreasonably' came before the Court of Session (the Lord President (LORD CLYDE), LORD CARMONT and LORD SORN) on an appeal in an adoption application. The mother had withdrawn her consent and the sheriff-substitute had refused to dispense therewith on the ground that the welfare of the child was not a factor which he was entitled to take into consideration. The First Division remitted the matter to the sheriff-substitute holding that in determining whether consent had been unreasonably withheld he ought to have taken into account all the circumstances of the case including, inter alia, the welfare of the child. The Court of Session had before it the decision of the Court of Appeal in *Re L (an infant)* (1) to which I have already referred. This decision had been pronounced subsequently to the hearing before the sheriff-substitute, but the text of the judgments must have been available to the Court of Session as the Lord President and LORD SORN quote from the judgment of LORD DENNING MR which I have already cited. The Lord President also referred to several other English cases including *Re K (an infant)* (3) and *Hitchcock's case* (4) and, comparing them with what LORD DENNING had said in *Re L (an infant)*, observes:

(1) (1962), 106 Sol Jo 611.

(2) 1963 SC 124.

(3) 117 JP 9, 28; [1952] 2 All ER 877; [1953] 1 QB 117.

(4) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.



'In the other cases to which we were referred I can find nothing inconsistent with this latest exposition in England of the proper criterion to adopt. Although the welfare of the child is not in any of these cases regarded as the exclusive, or indeed the main, consideration in judging the reasonableness of the refusal, it is recognised in all of them as a consideration which, along with others, must be taken into account.'

LORD CARMONT agrees with the opinion of the Lord President, and LORD SORN, in considering the nature of the question to be determined, has this to say:

'It might be put something like this:—how would a parent, placed in the situation of the actual parent and having the qualities or defects of the actual parent, yet considering the situation reasonably, have decided the question? Would such a person have come to the conclusion that to refuse consent was unreasonable? Or, as LORD DENNING, M.R., put it, in [*Re L* (1)] in which a mother was withholding her consent, "We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case."

The reference here to 'the qualities or defects of the actual parent' may possibly suggest a subjective test, but apart from that I read the opinions of the Court of Session as adopting the criterion laid down by LORD DENNING and, further, as not recognising any distinction between that criterion and the criterion followed in *Hitchcock's* case (2) and in *Re K (an infant)* (3).

In 1964 the Court of Appeal had again to consider the meaning of 'unreasonably'. This was in *Re C (an infant)* (4). The court consisted of PEARSON and DIPLOCK LJJ. The mother of the child proposed for adoption had withdrawn her consent and the county court judge, after hearing medical evidence as to the effect of taking the child from the applicants who were its foster parents, had held that in view of the medical evidence and, alternatively, having regard to all the circumstances of the case, the mother had acted unreasonably in withholding her consent. The Court of Appeal dismissed the mother's appeal and affirmed the county court order. I need not rehearse the facts further as the present importance of the decision lies in what was said concerning the principles to be applied. PEARSON LJ, in reviewing the authorities, refers to *Hitchcock's* case (2) and to the judgment of JENKINS LJ in *Re K (an infant)* (3) and then quotes from *Re L (An Infant)* (1) the passage from LORD DENNING's judgment which I have set out above. PEARSON LJ refers to this as an important case, and his judgment contains no criticism of the test laid down by LORD DENNING and no suggestion that that test is based on a different construction of the statute from that accepted in the earlier decisions. DIPLOCK LJ expresses his agreement with PEARSON LJ and also quotes LORD DENNING's statement of the principles to be applied from his judgment in *Re L (An Infant)*. He then adds: "That was the test which the learned county court judge adopted in this case. In my view, it is the right test..." So far, the decision seems to confirm the natural construction. But in the earlier part of the judgment of DIPLOCK LJ there is another passage on which the present respondent relies. It is in these terms:

"The relevant consideration in deciding whether a parent is withholding consent unreasonably is the conduct of the parent (in this case the natural mother) of the child; but it is the conduct of the parent as a parent towards the

(1) (1962), 106 Sol Jo 611.

(2) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.

(3) 117 JP 9, 28; [1952] 2 All ER 877; [1953] 1 QB 117.

(4) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

child. This seems to me to be apparent from the various specific grounds on which parental consent can be dispensed with under s. 5 (1) and (2) of the Act of 1958, namely, that the parent whose consent is to be dispensed with "(a) has abandoned, neglected or persistently ill-treated the infant; or (b) cannot be found or is incapable of giving his consent . . .", or "has persistently failed without reasonable cause to discharge the obligations of a parent . . . of the infant . . .". Apart from incapacity, each of these specific grounds is an example of the parent having shown a callous or self-indulgent indifference to the welfare of the child, using "welfare" in the broad sense and not that of mere material advantages, a sense in which it is so often used. In considering whether the consent is being unreasonably withheld a similar test, in my view, has to be applied: Does the withholding of the consent by the parent show a callous or self-indulgent indifference to the welfare of the child? Let me hasten to say that, in this case, no question of callous indifference arises; it is one of self-indulgent indifference, in my view.'

I find difficulty in reconciling this and the passage I have referred to earlier, as each seems to point to quite a different interpretation of 'unreasonably'. But DIPLOCK LJ says: 'I think that I am doing no more than repeating, in rather more emphatic words, what LORD DENNING said in *Re L* (1) . . .', and it may be, at any rate as respects instances turning on the welfare of the child, that the test which commended itself to DIPLOCK LJ is to be found in that part of his judgment which immediately precedes the last quotation and reads thus:

'The question, indeed, that should be put I would put in these terms: Would a reasonable parent regard a refusal to permit the adoption of the child as involving a serious risk of affecting the whole future happiness of the child?'

Lastly, I would refer to the decision of the Court of Appeal (DAVIES, WINN and KARMINSKI LJ) in *Re B (an infant)* (2). This was an appeal from the Bournemouth County Court which refused an application to dispense with the consent of the mother of the child on the ground that she was withholding her consent unreasonably within the meaning of s 5 (1) (b) of the Act. I need not go into the rather unusual facts of the case. The appeal of the applicants for the adoption order was unanimously allowed and the adoption sought was approved. The immediate importance of the case lies in what was said on the question of construction and, in particular, on the views previously expressed by the Court of Appeal in the case which is now before your Lordships. DAVIES LJ, after considering the structure of s 5 (1) and (2) and the distinction to be drawn between sub-s (1) (b) and the other provisions of these subsections, continues thus:

'To put it in another way, the two subsections do not, in my judgment, deal with seven examples of improper but similar conduct, they do not constitute a genus, and the cases covered by sub-s (1) (b) are not in *pari materia* with the others. However difficult it may be in any individual case to decide whether the withholding of consent is unreasonable (even though, as is plain on the authorities and as was admitted in the present case by counsel for the mother, the test of reasonableness is an objective one), the problem is not rendered any easier by the substitution of some other and different word for "unreasonably" or "unreasonable". Indeed, to do so serves only to render the problem more difficult and to give the statute a meaning which its words do not bear.'

(1) (1962), 106 Sol Jo 611.

(2) [1970] 3 All ER 1008.

Then, after considering *Hitchcock's* case (1) and the judgment of JENKINS LJ in *Re K* (2) he says:

'This clear distinction between misconduct or dereliction of duty on the one hand and unreasonable withholding of consent on the other, when applied to the present case, shows that s 5 (1) (b) of the present Act deals with an entirely different state of affairs from that covered by s 5 (1) (a) and (2). It also, in my view, strongly suggests that in order to come within s 5 (1) (b) no element of misconduct, culpability or blameworthiness is necessary.'

And later, in a review of the leading cases on the subject, DAVIES LJ expresses his approval of the test as laid down by LORD DENNING MR in *Re L* (3) and applied by PEARSON LJ in *Re C* (4). In the course of his valuable judgment WINN LJ, after tracing the history of the relevant legislation and examining its form, proceeds:

'It cannot be doubted that s 5 (2) and s 5 (1) (a) are aimed at parents who have forfeited the rights and privileges in relation to their child which would otherwise have been inherent in their parenthood; on the other hand, s 5 (1) (b) does not, as I see the matter, relate to any form of misconduct in the capacity of parent or otherwise, or to any behaviour or defect to which any pejorative epithet or any form of condemnation could properly be applied. It simply refers to three situations which are the same as those contemplated by and legislated for in the 1950 Act, s 3 (1) (a) and (c).'

And then, after considering the cases, including the judgments of the Court of Appeal in this case, he has this to say:

'I feel constrained diffidently to express my dissent from any suggestion that it is necessary to show that the refusal of a parent to consent to the adoption of his or her child involves any culpable conduct on the part of that parent in order to establish that such refusal was unreasonable; in my own quite definite opinion a parent may be entirely free from blame and in no respect culpable nor justifiably to be reproached in refusing consent to an adoption and yet it may in the judgment of the court be quite unreasonable to refuse such consent.'

KARMINSKI LJ agrees with the conclusions and reasoning of both his colleagues and is expressing the views of all when he adds:

'With very real respect to eminent judges who have thought otherwise, I think that it is wrong to import into the section the test of culpability or misconduct or callous or self-indulgent indifference. In my view the question is whether on the facts of this particular case, the mother's consent was unreasonably withheld.'

My Lords, in my opinion this review of the authorities leaves no place for what I have called the special construction and confirms the tentative view, which I have expressed above, as to the meaning and application of the words of s 5 (1) (b) 'is withholding his consent unreasonably'.

It remains to consider the county court proceedings, and to see whether the learned county court judge (a) applied the right test and (b) reached a determination which can be sustained on the material that was before him.

(1) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.

(2) 117 JP 9, 28; [1952] 2 All ER 877; [1953] 1 QB 117.

(3) (1962), 106 Sol Jo 611.

(4) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

In the Court of Appeal it was held that the judge had applied the wrong test and had adopted a 'welfare' approach in that, in the words of RUSSELL LJ, his

'decision went entirely on his view as to the best interests of the child, notwithstanding his self-reminder that on this point that was not the sole consideration.'

My Lords, the record of the proceedings is not a verbatim report, but consists of the judge's note of the evidence and counsel's notes of the judgment; and this undoubtedly adds to the difficulties of following all that was said and done. It is also to be observed that the question of dispensing with the respondent's consent was not heard separately as a preliminary issue, all the evidence relating to that issue and the merits of the adoption application being heard at the same sitting, with the judgment covering both matters. This seems to be a sensible procedure, as it enables the withholding parent to hear all the evidence before she gives her own testimony and reaches a final decision as to consenting; but it tends to merge the two issues in the record and may for this reason add to the difficulties I have mentioned. Despite such difficulties, however, I cannot agree that the judge applied the wrong test. He quotes as his guide that part of the judgment of PEARSON LJ in *Re C* (1) which contains the test described by LORD DENNING MR in *Re L* (2); and therefore, assuming that he means what he has stated so clearly and unequivocally, he has applied what I have called the natural construction, and, as I would hold, the correct test. This is also confirmed by an examination of the rest of the judgment. It proceeds to canvass the circumstances bearing on the welfare of the child, and it is plain enough that the judge had no difficulty in forming the view that the adoption would be in the child's best interests. But after that he comes to something he thinks is difficult and, therefore, it would seem, different. It is here that the judgment turns to the question of dispensing with the mother's consent. This concluding part is in these terms, according to the note:

'Doing the best I can—I find this case difficult—looking at the matter quite dispassionately and saying what should a reasonable mother do in these circumstances—consent or refuse consent—I take the view, getting the guidance I can from the cases—I take the view that the reasonable mother should consent in all the circumstances of this case. It is inevitable—it must be the best for the welfare of the child. In all the circumstances I feel she is unreasonably withholding consent in this case. I order that her consent should be dispensed with.'

My Lords, I cannot read this passage as meaning that the learned judge dispensed with the mother's consent merely because he regarded adoption as best for the child. He has applied LORD DENNING's test; he has been at pains to say so; and he has experienced a difficulty which does not seem to have troubled him about the view that adoption would be for the welfare of the boy.

The second question is whether there was sufficient evidence to sustain the judge's decision to dispense with the mother's consent. In my opinion, there was. As I have already indicated, this is not an issue to be decided against the parent on considerations which lack substance or are in doubt. I see no reason to believe that the judge erred in this respect, and I regard his determination as depending on much more than some minor advantage which adoption could bring. Without attempting to summarise the judgment on this aspect of the matter, I think the judge plainly found that the child would have a much more stable home life and upbringing with

(1) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(2) (1962), 106 Sol Jo 611.

the appellants than with his mother, the respondent. 'I can't help feeling there is a grave risk of another association and another unwanted child arriving on the scene' was the conclusion of the judge after hearing the respondent's history and seeing and hearing her under examination. In my opinion, he had ground enough on which to find the respondent unreasonable in withholding her consent. I would therefore allow the appeal and restore the adoption order.

**LORD HODSON:** This appeal concerns an order for the adoption of a small child born in March 1968, who has been living on a fostering basis with the appellants, the applicants for an adoption order, since shortly after his birth. The respondent, the mother of the child, opposes the order. She failed in her opposition before the judge whose order was reversed by the Court of Appeal. The child is now technically in the care of the Tower Hamlets local authority under s 1 of the Children Act 1948. The question raised is whether, having regard to the relevant provisions of the Adoption Act 1958, the facts found by the judge afforded any evidence capable in law of satisfying him that the respondent's consent was unreasonably withheld so as to empower him, if so satisfied, to dispense with the necessity of such consent.

I have stated the question in this way although the Court of Appeal, in reversing the judge's finding, took the view that he had erred in law in considering the facts in such a way as to cause him to give a wrong decision on the facts. The court thus felt itself to be in a position to substitute its own finding of fact for that of the judge and much of your Lordships' time has been spent in considering whether or not the Court of Appeal were right in their conclusion that the judge had erred in law so as to throw open the facts for a new finding in place of that which he had made. It is from this new finding, and the consequent reversal of the judge's conclusion, that consent was unreasonably withheld that the applicants appeal.

I must refer to some of the sections of the 1958 Act. Section 4 lays it down that no adoption order can be made without the consent of the parent, subject to s 5 which gives power to dispense with consent in exceptional cases. This section provides:

'(1) The court may dispense with any consent required by paragraph (a) of subsection (1) of section four of this Act if it is satisfied that the person whose consent is to be dispensed with—(a) has abandoned, neglected or persistently ill-treated the infant; or (b) cannot be found or is incapable of giving his consent or is withholding his consent unreasonably.

'(2) If the court is satisfied that any person whose consent is required by the said paragraph (a) has persistently failed without reasonable cause to discharge the obligations of a parent or guardian of the infant, the court may dispense with his consent whether or not it is satisfied of the matters mentioned in subsection (1) of this section.'

Section 7 (1) (b) provides that before making an adoption order the court shall be satisfied that the order, if made, will be for the welfare of the infant.

The decision to be taken whether or not consent has been unreasonably withheld is anxious and nearly always difficult, bearing in mind that the consequence of adoption is that the rights and duties of parents in relation to the infant in question are extinguished and vest in the adopter as if the infant were a child born to him in lawful wedlock (see s 13 of the Act).

Before dealing with the facts of the case it is necessary to emphasise that in this carefully drawn Act, which takes the place of the Adoption Act 1950 to which I must refer, power to dispense with the consent required before an adoption can be

made is dealt with in two contrasting paragraphs. In s 5 (1) (a) the words 'has abandoned, neglected or persistently ill-treated the infant' involve a finding of misbehaviour or, if one likes, culpability against the parent. By contrast, s 5 (1) (b) has nothing to say about culpability. It is alternative to s 5 (1) (a), and I refer again to its wording 'cannot be found or is incapable of giving his consent or is withholding his consent unreasonably'. The language of s 5 (1) is perfectly plain and is not, I think, to be construed by reference to s 5 (2) as was contended before your Lordships.

The test of unreasonableness is objective, and it has been repeatedly held that the withholding of consent could not be held to be unreasonable merely because the order, if made, would conduce to the welfare of the child. In *Hitchcock v W B* (1) decided under the 1950 Act which contained provisions to the same effect as the 1958 Act, LORD GODDARD CJ said:

'the mere fact that the adoption order will be for the benefit of the child does not answer the question whether consent is being unreasonably withheld. I am not going to attempt, because it would be a most dangerous thing to do, to lay down in general terms what would amount to the unreasonable withholding of consent, for circumstances in this life are so various ...'

DEVLIN J, agreeing with LORD GODDARD, said: 'it is plain that the ... test is no longer the welfare of the child.' He was contrasting the language of the 1950 Act with that of the earlier Adoption of Children Act 1926 which gave an absolute discretion to dispense with consent.

The *Hitchcock* case (1) was approved by the Court of Appeal in *Re K (an infant)*, *Rogers v Kuzmicz* (2) in a judgment of the whole court delivered by JENKINS LJ. The court asked itself the question:

'in what circumstances is a parent, not guilty of any such misconduct or dereliction of duty [as referred to in the 1950 Act], to be held to have acted unreasonably in withholding his or her consent to an order the effect of which, if made, will be to extinguish once and for all his or her parental rights, duties and obligations in regard to the infant, and, indeed, the very relationship between them of parent and child, and to make the infant thenceforth the child of the adopters in substitution for, and to the utter exclusion of, its natural parents?'

The court answered the question by saying that one could imagine cases short of those mentioned in the Act in which a parent's withholding of consent to an adoption order must be held to be unreasonable, but that, in the view of the court, such cases must be exceptional. Following LORD GODDARD's judgment in the *Hitchcock* case it was said that it was unnecessary, undesirable, and, indeed, impracticable to attempt a definition covering all possible cases of that kind. Each case must depend on its own facts and circumstances. This decision has not been criticised before your Lordships or distinguished by reason of the different wording of the 1958 Act or for any reason, and I do not resile from it.

I have thought it right to repeat what was then said because, for some reason or another, some recent judgments of the Court of Appeal have imported, or at any rate seem to me to have imported, a different test and to have gone some way towards substituting other words for the word 'unreasonably'. The point is well taken in the analysis of the language of the section contained in the recent case of *Re B* (3) in which judgment was delivered on 8th October 1970, after the instant case and in particular by DAVIES LJ, who quoted the passage in *Re K (an infant)* (2) which stated that: 'the

(1) 116 JP 401; [1952] 2 All ER 119; [1952] 2 QB 561.

(2) 117 JP 9, 28; [1952] 2 All ER 877; [1953] 1 QB 117.

(3) [1970] 3 All ER 1008.



withholding of a parent's consent to an adoption order cannot be held unreasonable merely because the order, if made, would conduce to the welfare of the child.'

DAVIES LJ went on to underline the word 'merely', saying:

'from nearly all the judgments... it is apparent that one of the matters which should be taken into consideration is the welfare of the child. Perhaps it would be more accurate to say that one of the matters which a parent ought reasonably to take into consideration in deciding whether or not to withhold consent should be the prospects and outlook for the child if adopted as compared with those if unadopted; these prospects would include material and financial prospects, education, general surroundings, happiness, stability of the home and the like.'

I cannot improve on this statement which is, I think, consistent with an equally valuable statement of LORD DENNING MR in *Re L (An Infant)* (1) in considering the same question when he said:

'I must say that in considering whether she is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for her child. Her anguish of mind is quite understandable; but still it may be reasonable for her to withhold consent. We must look and see whether it is reasonable or unreasonable, according to what a reasonable woman in her place would do in all the circumstances of the case.'

In another case, *Re C (an infant)* (2), PEARSON LJ adopted and applied the test of LORD DENNING in *Re L* (1) adding these words: 'I would think it is right that it is primarily the welfare of the child that the mother should have in mind.' In the same case DIPLOCK LJ followed the same line saying:

'The question, indeed, that should be put I would put in these terms: "Would a reasonable parent regard a refusal to permit the adoption of the child as involving a serious risk of affecting the whole future happiness of the child?"'

It is true that he previously said: 'Does the withholding of the consent by the parent show a callous or self-indulgent indifference to the welfare of the child?' This is putting the matter in a different way, as WINN LJ pointed out in his judgment, and introduces notions of misconduct or dereliction of duty which form no part of the concept of unreasonableness under s 5 (1).

The same comment made by WINN LJ applies to the judgment of SACHS LJ in this case. He expressed the view that in order to establish the unreasonableness of a refusal of consent there must be shown a high degree of culpability on the part of the parent. I would say no more than that I agree with the comments of WINN LJ and, in so far as CROSS LJ lends countenance to the 'culpability' notion in speaking of blameworthiness, I cannot accept his formulation of reasonableness in this case. RUSSELL LJ did not associate himself with the culpability notion in any way. The Scottish cases to which your Lordships have been referred are, I think, in line with the test of unreasonableness as propounded by LORD DENNING MR.

The facts of the instant case as found by the judge are contained in a note taken by counsel and signed by the judge as being in accordance with his recollection of what he said at the time. This material is supplemented by the report of the guardian ad litem. He began his judgment by accepting the guidance given to him by the

(1) (1962), 106 Sol Jo 611.

(2) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

passage which I have cited from the judgment of LORD DENNING in *Re L* (1), and approached the matter objectively, having heard the evidence of one of the applicants and the respondent and having read the report of Miss Ramsey, the guardian ad litem.

The respondent left home when she was 17 and went to live with a man by whom she had two daughters born out of wedlock. The man left her some time after the birth of the second child. She formed an association with another man as a result of which W, the subject of these proceedings, was born on 28th March 1968. The man left her when he found that she was pregnant. Before the birth she was living with her two daughters in a furnished room in Swedenborg Square hoping for a council tenancy. The child was born at the London Hospital and, on the respondent's discharge from hospital, was received into the care of the Tower Hamlets children's department, and on 5th April 1968, was placed with the appellants temporarily while arrangements were made for adoptive parents to be found. He has been with the appellants ever since. Before his birth the respondent was offered better accommodation by the local authority where she now lives with her two daughters. The respondent was not in a position to take the child back until July 1968 when she discussed the question with the child care officer who advised against this course as it might disturb the child. The material position then was that the respondent was living on social security and family allowances and paying £3 a week rent. The appellants are materially in better circumstances and have a stable home. The respondent gave consent to the adoption on 4th February 1969, but subsequently withdrew her consent and has always since then maintained her desire to keep in touch with her child.

There was no medical evidence, but the judge took into account from the welfare point of view the uprooting element involved in taking the child away from the appellants and handing over to the respondent after the lapse of some 16 or 17 months. The judge noted the favourable reports as to the general atmosphere in the appellants' home and compared the difficult circumstances in which the respondent was living with no fixed or certain plans. Looking to the future, as he had to do, the judge regarded as a legitimate comment the observation of counsel that there must be an enormous question mark as to the mother. He concluded by saying:

'It does seem she does make relationships with men which are very unsatisfactory as far as one can see. She may be unlucky. I can't put it out of my mind. I asked her if another unwanted child might arrive on the scene. "No" said the [respondent]. I can't help feeling there is a grave risk of another association and another unwanted child arriving on the scene. A grave risk. Again I asked the [respondent] about getting married. What if a man says—"Sons of my own, yes. But the son of another man, no. Not a bastard". There must be inevitably, to my mind, a risk of that some time in the future.'

The last paragraph of the judgment is, I think, vital, for it shows that the judge kept separate in his mind the welfare aspect relevant to the making of an adoption order and the different question whether the reasonable mother should consent in all the circumstances. I shall quote it in full as it appears in the note of the judgment:

'Doing the best I can—I find this case difficult—looking at the matter quite dispassionately and saying what should a reasonable mother do in these circumstances—consent or refuse consent—I take the view, getting the guidance I can from the cases—I take the view that the reasonable mother should consent

withholding of a parent's consent to an adoption order cannot be held unreasonable merely because the order, if made, would conduce to the welfare of the child.' DAVIES LJ went on to underline the word 'merely', saying:

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'Doing the best I can—I find this case difficult—looking at the matter quite dispassionately and saying what should a reasonable mother do in these circumstances—consent or refuse consent—I take the view, getting the guidance I can from the cases—I take the view that the reasonable mother should consent

in all the circumstances of this case. *It is inevitable—it must be the best for the welfare of the child.* In all the circumstances I feel she is unreasonably withholding consent in this case. I order that her consent should be dispensed with.'

This passage convinces me that the judge was not, as the Court of Appeal thought, regarding the matter as 'a welfare case'. Saying that he found the case difficult he must have been applying himself to the question of reasonableness in refusing consent which is an anxious and difficult question. On the other hand, looking at the welfare aspect relevant to the question whether an adoption should be made in favour of the adoptive parents, as s 7 of the 1958 Act required him to do, he had no difficulty. He said that the decision was inevitable in favour of the appellants. I do not, therefore, find myself able to accept the basic criticism, which underlies the judgments in the Court of Appeal, that the judge misdirected himself in law in regarding the case from the point of view of welfare and nothing else. He had begun by directing himself correctly by reading the passage about welfare from LORD DENNING's judgment in *Re L* (1), and showed in the last paragraph which I have emphasised that he did not regard mere welfare as the deciding factor but that he was deciding what, in his opinion, a reasonable mother should do following the test propounded by LORD DENNING in *Re L*. This test concluded with the sentence:

'We must look and see whether it is reasonable or unreasonable according to what a reasonable woman would do in all the circumstances of the case.'

The judgment of the county court judge did not contain a perverse finding of fact. He is not shown to have misunderstood the evidence nor misdirected himself in law. In those circumstances, in my opinion, his judgment should be restored, for I think that evidence which we heard was capable in law of satisfying him that the respondent's consent was unreasonably withheld so as to empower him, if so satisfied, to dispense with the necessity of such consent. I would allow the appeal.

**LORD GUEST:** I have found this a difficult and anxious case. The county court judge held that the respondent had unreasonably withheld her consent to the adoption of her child, W, by the appellants. The Court of Appeal reversed his decision. Although the court were unanimous, their grounds of judgment were different. SACHS LJ held that under s 5 (1) (b) of the Adoption Act 1958 an element of 'culpability' was necessary before it could be shown that the parent had unreasonably withheld his or her consent to the adoption. I can see no ground for such a construction of s 5 (1) (b). The other grounds contained in sub-s (b) on which consent can be dispensed with contain no common element of culpability. SACHS LJ has, in my view, wrongly applied the doctrine of interpretation epitomised in the Latin maxim *noscitur a sociis* to the construction of s 5 (1) (b). CROSS LJ expresses his view in this way:

'To bring a case within the section, the court, I would think, must be able to say: "This is really too much. Making every allowance for the difficulty of your position, in refusing your consent you are failing to face up to obvious facts. You are shutting your eyes to a blameworthy degree to the very serious consequences which your refusal of consent will almost certainly entail for your child".'

Elsewhere he quotes with approval a statement by DIPLOCK LJ when he speaks of a self-indulgent indifference to the welfare of the child in *Re C (an infant)* (2). Here, again, CROSS LJ was, in my view, putting a gloss on the words of the section which

(1) (1962), 106 Sol Jo 611.

(2) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.



they cannot bear. The section speaks of 'unreasonably withholding consent' and the interpretation is not assisted by using other words instead of the statutory phraseology. The test is an objective one and the question is whether a mother acting reasonably in the circumstances would have withheld her consent.

RUSSELL LJ took a slightly different view and held that the county court judge had erred in law in putting the test of unreasonableness as dependent solely on the welfare of the child. If I had thought that this was the effect of his Honour's judgment I should have agreed with RUSSELL LJ. The judgment of the county court judge had been subjected to microscopic examination in the course of the hearing. But it must be remembered that this was not a considered judgment but was given *ex tempore* at the end of a morning's hearing and what we have is not a transcript of the judgment but only counsel's longhand note taken—I may say with great clarity—while his Honour was giving judgment. It cannot, therefore, be subjected to the same critical approach as a conveyancing document. It is suggested by RUSSELL LJ that this was a 'welfare judgment' pure and simple and this shows that the judge applied the wrong test. Most judgments in cases under s 5 (1) (b) must take considerable account of welfare in the way explained by PEARSON LJ in *Re C* (1) where he said:

'In a passage which was quoted by the learned judge in the course of his long and careful judgment . . . LORD DENNING MR said [in *Re L* (2)]: "In considering the matter I quite agree that: (i) the question whether she is unreasonably withholding her consent is to be judged at the date of the hearing; and (ii) the welfare of the child is not the sole consideration; and (iii) the one question is whether she is unreasonably withholding her consent. But I must say that in considering whether she is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable; but still it may be unreasonable for her to withhold consent. We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case".'

This was the test on which the judge, having stated that the test was an objective one, directed himself at the outset of his judgment and this was, in my view, the correct test. There followed in the judgment a recital of the facts in which the welfare of the child not unnaturally formed a prominent part. The judge had in any event to consider the aspect of welfare in relation to s 7 (1) (b) of the Act. In the course of this recital he refers to the report of the guardian ad litem who made a most careful investigation of the circumstances and reached this conclusion:

'I am in some difficulty in making a recommendation to the court. I feel that the [respondent] could offer her child a good home and could be a good mother. However, one would expect the infant to be emotionally affected by a change and I rather doubt if the [respondent] would have the emotional resources to deal with such difficulties. Her motives are genuine and yet one doubts how deep her feelings are for the child after a year without contact. The [appellants] have been known to me for a longer period and I am satisfied could offer the infant an excellent home with a great deal of love and understanding. The court may be of the opinion that the rights of the natural mother should be respected. If there is any doubt in the matter I would recommend that on balance the best interests of the infant would lie with the [appellants], who have successfully cared for him for the first year of his life and who in the future could offer him greater stability and security.'

(1) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(2) (1962), 106 Sol. Jo 611



At the end of his Honour's judgment there occurs this passage:

'Doing the best I can—I find this case difficult—looking at the matter quite dispassionately and saying what should a reasonable mother do in these circumstances—consent or refuse consent—I take the view, getting the guidance I can from the cases—I take the view that the reasonable mother should consent in all the circumstances of this case. It is inevitable—it must be the best for the welfare of the child. In all the circumstances I feel she is unreasonably withholding consent in this case. I order that her consent should be dispensed with.'

This passage shows that the judge was considering separately the question of unreasonably withholding consent under s 5 (1) (b), which he categorises as 'difficult', from the question of s 7 (1), pure welfare, the finding on which he describes as 'inevitable'.

Although the case was not referred to in the courts below, I think that the opinions of the Lord President (LORD CLYDE) and LORD SORN in *A B and C B v X's Curator* (1) express the correct approach to the question. I adopt respectfully LORD SORN's judgment:

'As I see it, neither of these alternative ways of approaching the question is right. The proper way to approach the question is to look at the matter from the point of view of the parent and, having regard to the whole circumstances, to ask whether the parent's decision to withhold consent was an unreasonable decision for the parent to have made. It might be put something like this:—how would a parent, placed in the situation of the actual parent and having the qualities or defects of the actual parent, yet considering the situation reasonably, have decided the question? Would such a person have come to the conclusion that to refuse consent was unreasonable? Or, as LORD DENNING MR put it, in a case in which a mother was withholding her consent, "We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case".'

In my view, no error of law has been shown to have affected the judgment of the learned county court judge. In these circumstances the only question is whether there was evidence on which he could come to the conclusion that the respondent had unreasonably withheld her consent. Parliament has entrusted the decision of this matter in the first instance to the county court and, for my part, I should be reluctant to disturb a decision reached without error of law on a matter which must depend to a large extent on the impression formed on the trial judge as to the character of the mother and other witnesses. I prefer not to rely on my own judgment but to say that there was ample evidence on which the judge had reached his conclusion. I think that the error into which RUSSELL LJ has fallen is to substitute his own judgment on the facts for that of the trial judge, as is shown by the passage in the judgment. I would allow the appeal and restore the judgment of the county court judge.

**LORD DONOVAN:** Section 5 (1) of the Adoption Act 1958 specifies six grounds on any one of which a parent or guardian's consent to adoption may be dispensed with. These grounds are separate and independent. No genus is constituted of which all are species. There is no attribute, for example, common to the parent who has 'persistently ill-treated the infant' and the parent who 'cannot be found' or 'is incapable of giving his consent'. In contrast with these situations, the unreasonable withholding of consent obviously opens up a wider field of enquiry;

and in enacting such a provision Parliament must have recognised that anything like a specification of unreasonableness in this context was impossible. The courts would have to judge each case on its own facts.

It cannot be right, therefore, for a court to decree that unreasonableness for the purpose in hand will be limited to conduct exhibiting, at least as one of its features, some specified fault. To do this crosses the line between interpretation and attempted legislation. It has, however, been done in this case. SACHS LJ refers to 'the necessity first to establish culpable conduct by the parent'. CROSS LJ would require 'a degree and standard of unreasonableness which though not amounting to misconduct with regard to the child does not fall far short of it'. And in *Re C* (1) in the Court of Appeal 'callous or self-indulgent indifference' was specified as the test. It may, of course, well be that in particular cases, conduct of the kind so described would justify a finding of unreasonableness; I merely say it is not essential to it. I think the proper course is to take the language of the section as it stands, and to decide whether the withholding of consent is unreasonable according to what a reasonable parent would do in all the circumstances of the case. The question is to be judged as at the date of the hearing of the application for adoption; the test of unreasonableness is objective and not subjective; and while the welfare of the child is not, as it is in custody proceedings, the paramount consideration, it is inferior in importance to no other. In saying this I am repeating in substance that which fell from LORD DENNING MR in *Re L* (2) in 1962, with which I still agree. I would also endorse what was recently said on this subject by a differently constituted Court of Appeal in *Re B (an infant)* (3).

SACHS LJ in the present case, besides adopting a construction of the relevant provisions which, like all your Lordships, I cannot endorse, went further; and in a laudable desire to simplify a difficult problem for all those who may hereafter be confronted with it, constructed a series of eight propositions embodying 'the points that fall to be kept in mind as relevant to the approach' to the decision. With some of the propositions in this catalogue I would not presume to quarrel; as regards others I would have some reservations: and from others (at least as they are expressed) I would dissent. For example, the proposition numbered (7) in the judgment seems to suggest that the test of unreasonableness in this context is a subjective one, whereas like all your Lordships (and the parties themselves) I think it is objective. But the real objection is to any such catalogue at all, the risk being that it may be treated as, and given the rigidity of, a code. Yet remembering that the same conduct or attribute may make for reasonableness in one parent and for unreasonableness in another a judicial endeavour at codification is, I respectfully think, better not attempted.

RUSSELL LJ in his judgment does not propound any such construction of s 5 as appealed to his colleagues. He does, however, say that:

'there may be cases in which the circumstances related to the welfare of the child are such that no mother acting reasonably should withhold consent to the adoption; but it seems to me that this requires a clear prognosis of relative harm to the child if the adoption order is not made ...'

I think the last sentence is putting the matter a little too high if it be intended as a universal proposition.

The ground on which RUSSELL LJ reversed the county court judge was that, in his opinion, the latter's decision 'went entirely on his view as to the best interests of

(1) 129 JP 62; [1964] 3 All ER 483; [1965] 2 QB 449.

(2) (1962), 106 Sol Jo 611.

(3) [1970] 3 All ER 1008.

the child'. His colleagues shared this conclusion, SACHS LJ saying of the judgment in the county court that 'taken as a whole it is what might be called "a welfare" judgment . . .' and CROSS LJ thinking that the judge applied the wrong test: 'The question which he asked himself was: "Am I satisfied that the making of the adoption order will promote the welfare of this child?"' instead of the question whether the respondent was acting unreasonably in withholding her consent.

Having read and re-read the note of the county court judge's decision, I do not find myself able to share these conclusions. He begins by reminding himself of the words of LORD DENNING MR in *Re L (An Infant)* (1) and he says specifically that the welfare of the child is not the sole consideration he has to take into account. Then, after going through the facts, and considering the risk of emotional disturbance in the child if transplanted, and the risk inherent in the frailties of the respondent, he concludes his judgment by again avowing that he has come to his decision 'in all the circumstances of the case'. In the middle of his judgment he certainly does dwell on the guardian ad litem's report which, in its concluding passages, suggests that the welfare of the child would be best served by leaving him with the appellants. And the concluding paragraph of the note of his judgment contains these words: 'I take the view—that the reasonable mother should consent in all the circumstances of the case. It is inevitable—it must be best for the welfare of the child.' Unless it were prompted by s 7 (2) of the Act I find it a little difficult to appreciate the true meaning of the last sentence in this passage which sounds slightly out of context. One has to remember that it occurs in a longhand note being taken by counsel at the time, and a word or two may quite understandably be omitted. But since they are preceded by an assertion by the judge that he has taken all the circumstances of the case into account, and are followed by a final statement to the same effect, I cannot treat the words I have quoted as betraying some sudden aberration on the part of the judge leading to a new and completely wrong conception of his task. Furthermore, he begins the final paragraph by saying 'Doing the best I can—I find this case difficult . . .' As counsel for the appellants observed, what was there in the case which was difficult? Certainly not an assessment of the rival prospects of welfare. The difficulty was to decide whether consent was being unreasonably withheld and it must have been this which was on the judge's mind, and which he says he decides 'in all the circumstances'.

While the welfare of the child is not the paramount consideration in adoption cases where the parent withholds consent, it remains a matter of great importance. This is emphasised when one recalls that other matters which have to be taken into consideration become relevant only because of their bearing on that welfare even though this may not be expressly stated. For example, in the present case the possible frailty of the respondent in relation to men was referred to both in the county court and in the Court of Appeal. Yet of itself that is neither here nor there. It is only because of its possible impact on the child's welfare that any such weakness required to be considered. And the same can be said of other considerations, bearing at one remove only on the child's welfare, but nevertheless pertinent only to that question. The exploration of these matters does not make any judgment predominantly a 'welfare' judgment in any sense which would invalidate it.

The evidence which the county court judge had before him revealed a case of a young girl (the natural mother) leaving home at the age of 17 and going to live with a man by whom she had two illegitimate daughters. He left her and she then formed a liaison with another man by whom she had the present child—also illegitimate. Both fathers have deserted her. Before this third child was born she decided to have it adopted and after its birth she signed the required form of consent. Having settled

(1) (1962), 106 Sol Jo 611.

down in better accommodation provided by the local council she withdrew this consent about a month later and decided that she would keep the child. She is keeping her other two illegitimate children, and looks after them well with the help of her own mother and sisters and a female cousin of 27 who lives with her. She does not work but lives on social security payments. There is no male influence in the home beyond an uncle of the mother, aged about 34, who visits the home about once a week. She hopes to get married later.

The appellants were described by the guardian ad litem as an extremely pleasant happily married couple with whom the infant has made good progress. They have two other children, one adopted, one natural. The adoptive father works in the printing trade and earns £25 a week. He and his wife can give the infant greater stability and security. As compared with this, there must be, as the judge clearly thought, 'an enormous question mark' in relation to the respondent, and quite plainly, and quite legitimately, he could not put out of his mind the possibility of another association leading to another unwanted child. He assessed this as a grave risk.

Finding the problem of dispensing with the respondent's consent a difficult one, as indeed it is, he came to the conclusion on the whole of the circumstances that it ought to be dispensed with and that the adoption order should be made. I think the facts before him justified that finding; that he made no error of law; and that accordingly his decision should be restored and this appeal allowed.

*Appeal allowed.*

Solicitors: T V Edwards & Co; Wallace Bogan & Co.

G.F.L.B.

### HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE, LORD PEARSON AND LORD DIPLOCK)

3rd, 4th, 8th, 9th February, 31st March 1971

TESCO SUPERMARKETS LTD v NATTRASS

*Trade Descriptions—Defence—Act or default of another person—'Another person'—Company—Commission of offence through breach of duty by branch manager—Trade Descriptions Act, 1968, s 11 (2), s 24 (1).*

By s 11 (2) of the Trade Descriptions Act, 1968: 'If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.'

By s 24 (1): 'In any proceedings for an offence under this Act it shall . . . be a defence for the person charged to prove—(a) that the commission of the offence was due . . . to the act or default of another person . . .'

The appellants owned some hundreds of supermarkets at one of which they displayed notices indicating that they were selling a certain washing powder at 2s 11d a packet instead of at the normal price of 3s 11d. When these sales had been in progress for some time a customer at the store asked for a packet of the powder at the reduced price indicated in the notices. He was told that there were no more packets available at the reduced price, and he paid 3s 11d for a packet. At that time the reduced price notices had not been removed. The appellants having been charged with an offence under s 11 (2) (supra) it appeared that a shop assistant whose duty it was to put out fresh stock for sale had found that there were no more of the specially marked packets in stock and so had put out a number of packets marked

at the normal price, but she had failed to inform the manager, as she should have, of what she had done, and the manager did not, as was his duty, take steps to see either that specially priced packets were available for sale or that the notices were removed.

**HELD:** while a person such as a director or some other superior officer of a company who performed functions of management and spoke and acted as the company could not be 'another person' within s 24 (1) (*supra*), a shop manager in such a multiple business as that of the appellants could not be regarded as part of the appellant company's directing mind and will and so he could come within the words 'another person' in the subsection; therefore, the appellants, having committed the offence owing to the act or default of the manager in failing properly to supervise the work of the shop assistant, and having shown that they had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence, were entitled to avail themselves of the defence afforded by s 24 (1).

*R C Hammett Ltd v London County Council* (1933), 97 JP 105, and *Series v Poole* [1969] 1 QB 676, overruled.

**APPEAL** by Tesco Supermarkets Ltd against an order of the Divisional Court dismissing their appeal against their conviction by justices sitting at Northwich of an offence under s 11 (2) of the Trade Descriptions Act 1968 on an information preferred by the respondent, William Kenneth Nattrass.

*Andrew Rankin QC* and *J P M Phillips* for the appellants.

*E S Fay QC* and *R M Yorke* for the respondent.

Their Lordships took time for consideration.

31st March. The following opinions were delivered.

**LORD REID:** The appellants own a large number of supermarkets in which they sell a wide variety of goods. The goods are put out for sale on shelves or stands, each article being marked with the price at which it is offered for sale. The customer selects the articles he wants, takes them to the cashier, and pays the price. From time to time the appellants, apparently by way of advertisement, sell 'flash packs' at prices lower than the normal price. In September 1969 they were selling Radiant washing powder in this way. The normal price was 3s 11d but these packs were marked and sold at 2s 11d. Posters were displayed in the shops drawing attention to this reduction in price. These prices were displayed in the appellants' shop at Northwich on 26th September. Mr Coane, an old age pensioner, saw this and went to buy a pack. He could only find packs marked 3s 11d. He took one to the cashier who told him that there were none in stock for sale at 2s 11d. He paid 3s 11d and complained to an inspector of weights and measures. This resulted in a prosecution under the Trade Descriptions Act 1968 and the appellants were fined £25 and costs.

Section 11 (2) of the Act provides:

'If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.'

It is not disputed that that section applies to this case. The appellants relied on s 24 (1) which provides:

'In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions

and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.'

The relevant facts as found by the justices were that on the previous evening a shop assistant, Miss Rogers, whose duty it was to put out fresh stock found that there were no more of the specially marked packs in stock. There were a number of packs marked with the ordinary price so she put them out. She ought to have told the shop manager, Mr Clement, about this but she failed to do so. Mr Clement was responsible for seeing that the proper packs were on sale, but he failed to see to this although he marked his daily return: 'All special offers OK'. The justices found that if he had known about this he would either have removed the poster advertising the reduced price or given instructions that only 2s 11d was to be charged for the packs marked 3s 11d. Section 24 (2) requires notice to be given to the prosecutor if the accused is blaming another person and such notice was duly given naming Mr Clement.

In order to avoid conviction the appellants had to prove facts sufficient to satisfy both parts of s 24 (1) of the 1968 Act. The justices held that they

'had exercised all due diligence in devising a proper system for the operation of the said store and by securing so far as was reasonably practicable that it was fully implemented and thus had fulfilled the requirements of s 24 (1) (b).'

But they convicted the appellants because in their view the requirements of s 24 (1) (a) had not been fulfilled; they held that Mr Clement was not 'another person' within the meaning of that provision. The Divisional Court held that the justices were wrong in holding that Mr Clement was not 'another person'. The respondent did not challenge this finding of the Divisional Court so I need say no more about it than that I think that on this matter the Divisional Court was plainly right. But that court sustained the conviction on the ground that the justices had applied the wrong test in deciding that the requirements of s 24 (1) (b) had been fulfilled. In effect that court held that the words 'he took all reasonable precautions . . .' do not mean what they say; 'he' does not mean the accused, it means the accused and all his servants who were acting in a managerial or supervisory capacity. I think that earlier authorities virtually compelled the Divisional Court to reach this strange construction. So the real question in this appeal is whether these earlier authorities were rightly decided. But before examining those earlier cases I think it necessary to make some general observations.

Over a century ago the courts invented the idea of an absolute offence. The accepted doctrines of the common law put them in a difficulty. There was a presumption that when Parliament makes the commission of certain acts an offence it intends that mens rea shall be a constituent of that offence whether or not there is any reference to the knowledge or state of mind of the accused. And it was and is held to be an invariable rule that where mens rea is a constituent of any offence the burden of proving mens rea is on the prosecution. Some day this House may have to re-examine that rule, but that is another matter. For the protection of purchasers or consumers Parliament in many cases made it an offence for a trader to do certain things. Normally those things were done on his behalf by his servants and cases arose where the doing of the forbidden thing was solely the fault of a servant, the master having done all he could to prevent it and being entirely ignorant of its having been done. The just course would have been to hold that, once the facts constituting the offence had been proved, mens rea would be presumed unless the accused proved that he was blameless. The courts could not, or thought they could not, take that course. But they could and did hold in many such cases on a construction of the statutory provision that Parliament must be deemed to have



intended to depart from the general rule and to make the offence absolute in the sense that mens rea was not to be a constituent of the offence.

This has led to great difficulties. If the offence is not held to be absolute the requirement that the prosecutor must prove mens rea makes it impossible to enforce the enactment in very many cases. If the offence is held to be absolute that leads to the conviction of persons who are entirely blameless: an injustice which brings the law into dispute. So Parliament has found it necessary to devise a method of avoiding this difficulty. But instead of passing a general enactment that it shall always be a defence for the accused to prove that he was no party to the offence and had done all he could to prevent it, Parliament has chosen to deal with the problem piecemeal and has in an increasing number of cases enacted in various forms with regard to particular offences that it shall be a defence to prove various exculpatory circumstances. In my judgment the main object of these provisions must have been to distinguish between those who are in some degree blameworthy and those who are not, and to enable the latter to escape from conviction if they can show that they were in no way to blame. I find it almost impossible to suppose that Parliament or any reasonable body of men would as a matter of policy think it right to make employers criminally liable for the acts of some of their servants but not for those of others and I find it incredible that a draftsman, aware of that intention, would fail to insert any words to express it. But in several cases the courts, for reasons which it is not easy to discover, have given a restricted meaning to such provisions. It has been held that such provisions afford a defence if the master proves that the servant at fault was the person who himself did the prohibited act, but that they afford no defence if the servant at fault was one who failed in his duty of supervision to see that his subordinates did not commit the prohibited act. Why Parliament should be thought to have intended this distinction or how as a matter of construction these provisions can reasonably be held to have that meaning is not apparent.

In some of these cases the employer charged with the offence was a limited company. But in others the employer was an individual and still it was held that he, though personally blameless, could not rely on these provisions if the fault which led to the commission of the offence was the fault of a servant in failing to carry out his duty to instruct or supervise his subordinates. Where a limited company is the employer difficult questions do arise in a wide variety of circumstances in deciding which of its officers or servants is to be identified with the company so that his guilt is the guilt of the company.

I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

In *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1) the question was whether

(1) [1915] AC 705; [1914-15] All ER Rep 280.

damage had occurred without the 'actual fault or privity' of the owners of a ship. The owners were a company. The fault was that of the registered managing owner who managed the ship on behalf of the owners and it was held that the company could not dissociate itself from him so as to say that there was no actual fault or privity on the part of the company. VISCOUNT HALDANE LC said:

'For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502 [of the Merchant Shipping Act, 1894] . . . It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself.'

Reference is frequently made to the judgment of DENNING LJ in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* (1). He said:

'A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.'

In that case the directors of the company only met once a year; they left the management of the business to others, and it was the intention of those managers which was imputed to the company. I think that was right. There have been attempts to apply DENNING LJ's words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that DENNING LJ intended to refer to them. He only referred to those who 'represent the directing mind and will of the company, and control what it does'.

I think that is right for this reason. Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn. *Lennard's case* (2) was one of them.

In some cases the phrase alter ego has been used. I think it is misleading. When dealing with a company the word 'alter' is I think misleading. The person who speaks and acts as the company is not alter. He is identified with the company. And when dealing with an individual no other individual can be his alter ego. The other individual can be a servant, agent, delegate or representative but I know of neither principle nor authority which warrants the confusion (in the literal or original sense) of two separate individuals.

(1) [1956] 3 All ER 624; [1957] 1 QB 159.

(2) [1915] AC 705; [1914-15] All ER Rep 280.

The earliest cases dealing with this matter which were cited were *R C Hammett Ltd v Crabb*, *R C Hammett Ltd v Beldam* (1) and *R C Hammett Ltd v London County Council* (2). In both a servant of the accused company had infringed the provisions of s 5 (2) of the Sale of Food (Weights and Measures) Act 1926. Section 12 (5) exempted the employer from penalty if he charged another person as the actual offender and could prove:

'to the satisfaction of the court that he had used due diligence to enforce the execution of this Act, and that the said other person had committed the offence in question without his consent, connivance or wilful default . . .'

In the earlier case the offence was committed by the shop manager personally and he knew that he was committing an offence. A conviction was quashed on the ground that the magistrate had treated the question whether the employer had used due diligence as one of law, that it was really one of fact and that there was no evidence on which the magistrate could reach his decision. In the second case the offence was committed by a subordinate; the shop manager had warned him but had not exercised due diligence to see that his instructions were obeyed. Again the justices convicted on the ground that the owners were responsible for lack of due diligence in their manager. This time the conviction was upheld by the same court. It was argued for the respondents that the employer is responsible for the acts or omissions of all persons above the actual offender. It seems to me obvious that that is a matter of law depending on the proper construction of the statutory provision. But LORD HEWART CJ, did not so regard it. He said that there was evidence on which quarter sessions could arrive at their opinion and that they were entitled to come to the conclusion that the appellants were responsible for the manager's lack of due diligence.

I find these cases most unsatisfactory. There is no explanation of how it could be a question of fact whether the provisions of s 12 (5) meant that what the employer had to prove was that he personally had used due diligence, or that he also had to prove that some or all of his servants had also done so. But the court did not deal with that. Nevertheless because the only difference between the two cases appears to have been that in the first the shop manager was himself the offender whereas in the second the fault was lack of supervision, these cases have been thought to afford authority for the proposition that an employer has a defence if the only fault was in the actual offender but not if there was fault of any of his servants superior to the actual offender. I can find no warrant for that proposition in the terms of s 12 (5). Both parts of the provision—that the employer had used due diligence and that the offence had been committed without his consent, connivance or wilful default—appear to me plainly to refer to the employer personally and to no one else.

I agree with the view of the Lord Justice-General (LORD COOPER) in a case dealing with the same Act, *Dumfries and Maxwelltown Co-operative Society v Williamson* (3) that:

'The underlying idea manifestly is that there should not be vicarious responsibility for an infringement of the Act committed without the consent or connivance of an employer . . .'

In the next two cases a company was accused and it was held liable for the fault of a superior officer. In *Director of Public Prosecutions v Kent & Sussex Contractors Ltd* (4)

(1) (1931), 95 JP 180.

(2) (1933), 97 JP 105.

(3) 1950 JC 76.

(4) 108 JP 1; [1944] 1 All ER 119; [1944] KB 146.

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<b>CRIMINAL LAW</b> – Obtaining pecuniary advantage by deception – Betting transaction – Operative inducement – Theft Act, 1968, s 16 (2) (a) (c).	
<b>R v Aston. R v Hadley</b> .. .. .	CA 89

**CRIMINAL LAW - Road Traffic offences. See ROAD TRAFFIC infra.**

**CRIMINAL LAW - Sentence - Suspension - Act providing minimum sentences for specified offences - Power of court to suspend sentence - Criminal Justice (Temporary Provisions) (Northern Ireland) Act, 1970, s 1 - Treatment of Offenders (Northern Ireland) Act, 1968, s 18 (1).**

**Kennedy v Spratt** .. .. . **HL** 203

**CRIMINAL LAW - Theft - Ingredients of offence - Consent of owner obtained by dishonesty - Facts proved justifying conviction of obtaining property by deception - No bar to conviction for theft - Theft Act, 1968, s 1 (1), s 2 (1) (b), s 15 (1).**

**R v Lawrence** .. .. . **CA** 144

**CRIMINAL LAW - Theft - Ingredients of offence - Intention of permanently depriving another of property - Direction to injury - Theft Act, 1968, s 1 (1), s 6.**

**R v Warner** .. .. . **CA** 199

**CRIMINAL LAW - Venue - Indictable offence - Place where defendant 'in custody' - 'Custody' - Criminal Justice Act, 1925, s 11 (1).**

**R v Kulynych** .. .. . **CA** 82

**GAMING - Betting - Office - Advertisement - 'Premises giving access to a licensed betting office' - Display of sign on outside wall - Sign showing company's registered name and containing words 'turf accountants' - Indication that premises were licensed betting office - Betting (Licensed Offices) Regulations, 1960, reg 2 - Betting, Gaming and Lotteries Act, 1963, s 10 (5) (a), (b).**

**Maurice Binks (Turf Accountants) Ltd v Huss** .. .. . **QBD** 148

**GAMING - Forecast of future event - Photograph of players taken during football match - Ball not in photograph - Competitors required to mark most likely position of ball - Position later chosen by panel of judges - Success of competitors marking positions closest to that chosen by panel - Betting, Gaming and Lotteries Act, 1963, s 47 (a) (i).**

**Ladbroke (Football) Ltd v Perrett** .. .. . **QBD** 181

**GAMING - Pool betting - Lottery - 'Competition for prizes for making forecasts as to sporting events' - Need of skill in making forecasts - Lottery - Betting, Gaming and Lotteries Act, 1964, s 41, Sched 2, para 13 (a).**

**Singette Ltd and Others v Martin** .. .. . **HL** 157

**HIGHWAY - Gipsy - Encamping without lawful authority or excuse - Meaning of 'encamp' - Highways Act, 1959, s 127 (c).**

**Smith v Wood** .. .. . **QBD** 257

**HIGHWAY - Obstruction - Stall for sale of goods - Implied licence by local authority.**

**London Borough of Redbridge v Jaques** .. .. . **QBD** 98

**HOUSING - Compulsory purchase - Clearance area - Adjoining land - Need to show purchase necessary for satisfactory development or use of cleared area - "Cleared area" - Housing Act, 1957, s 43 (2).**

**Coleen Properties Ltd v Minister of Housing and Local Government** .. .. . **CA** 226

**HOUSING - Multiple occupation of premises - Requirements to execute works - Notice - Wilful failure to comply - Defence - Bona fide belief that works better performed later - Housing Act, 1961, s 15 (1) (3) - Housing Act, 1964, s 64 (1).**

**Honig v London Borough of Islington** .. .. . **QBD** 233

**HUSBAND AND WIFE - Maintenance of wife - High Court order registered in magistrates' court - Application for variation - Substantial expenditure of time - Remission to High Court - Maintenance Orders Act, 1958, s 4 (4).**

**Gsell v Gsell** .. .. . **PDA** 163

**HUSBAND AND WIFE - Matrimonial home and other properties bought in husband's name with wife's money - Sums transferred by wife to husband at his request - Imposition of trust on husband.**

**Heseltine v Heseltine** .. .. . **CA** 214

**HUSBAND AND WIFE - Matrimonial home - Separation order obtained by wife - Husband tenant of home - Power of court to exclude husband for limited time - Matrimonial Homes Act, 1967, s 1 (2).**

**Tarr v Tarr** .. .. . **CA** 222

**INFANT - Custody - Order of magistrates - Appeal - Further evidence - Discretion of appellate court.**

**Re B (T A) (an infant)** .. .. . **Ch D** 7

he was the transport manager. In *R v ICR Haulage Ltd* (1) it was held that a company can be guilty of common law conspiracy. The act of the managing director was held to be the act of the company. I think that a passage in the judgment is too widely stated:

'Whether in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and in cases where the presiding judge so rules whether the jury are satisfied that it has been so proved, must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case.'

This may have been influenced by the erroneous views expressed in the two *Hammett* cases. I think that the true view is that the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company. I have already dealt with the considerations to be applied in deciding when such a person can and when he cannot be identified with the company. I do not see how the nature of the charge can make any difference. If the guilty man was in law identifiable with the company then whether his offence was serious or venial his act was the act of the company but if he was not so identifiable then no act of his, serious or otherwise, was the act of the company itself.

In *John Henshall (Quarries) Ltd v Harvey* (2) a company was held not criminally responsible for the negligence of a servant in charge of a weighbridge. In *Magna Plant Ltd v Mitchell* (3) the fault was that of a depot engineer and again the company was held not criminally responsible. I think these decisions were right. In the *Magna Plant* case LORD PARKER CJ said:

'knowledge of a servant cannot be imputed to the Company unless he is a servant for whose actions the Company are criminally responsible, and as the cases show, that only arises in the case of a company where one is considering the acts of responsible officers forming the brain, or in the case of an individual, a person to whom delegation in the true sense of the delegation of management has been passed.'

I agree with what he said with regard to a company. But delegation by an individual is another matter. It has been recognised in licensing cases but that is in my view anomalous (see *Vane v Yiannopoulos* (4)).

The latest important authority is *Series v Poole* (5). That was an appeal against the dismissal of an information that the holder of a carrier's licence had failed to keep or cause to be kept records required by the Road Traffic Act 1960 with regard to the driver of a vehicle. That was an absolute offence but that was amended by the Road Traffic Act 1962 which provided by s 20 that it should 'be a defence to prove that he used all due diligence to secure compliance with those provisions'. The respondent proved that he had given proper instructions to the driver, that he employed a secretary to check the driver's records and had, to begin with, supervised her work, but that thereafter she failed to make proper checks. The justices held, possibly wrongly, that the accused had used all due diligence as required by the Act. The court accepted that finding but nevertheless sent the case back with a

(1) 108 JP 181; [1944] 1 All ER 691; [1944] KB 551.

(2) 129 JP 224; [1965] 1 All ER 725; [1965] 2 QB 233.

(3) (1966) 110 Sol Jo 349.

(4) [1964] 3 All ER 820; [1965] AC 486.

(5) [1967] 3 All ER 849; [1969] 1 QB 676.



direction to convict. LORD PARKER CJ dealt with the case on the basis that the accused had done everything that was reasonable. He said:

'He may . . . acting perfectly reasonably, appoint somebody else to perform his duty, his alter ego, and in that case, as it seems to me, if the alter ego fails in his duty the employer is liable. Equally, if the employer seeks to rely on the defence under s. 20, he must show that the alter ego has observed due diligence.'

I have already said that the phrase alter ego is misleading. In my judgment this case was wrongly decided and should be overruled. When the second statute introduced a defence if the accused proved that 'he used all due diligence' I think that it meant what it said. As a matter of construction I can see no ground for reading in 'he and all persons to whom he has delegated responsibility'. And if I look to the purpose and apparent intention of Parliament in enacting this defence I think that it was plainly intended to make a just and reasonable distinction between the employer who is wholly blameless and ought to be acquitted and the employer who was in some way at fault, leaving it to the employer to prove that he was in no way to blame.

What good purpose could be served by making an employer criminally responsible for the misdeeds of some of his servants but not for those of others? It is sometimes argued—it was argued in the present case—that making an employer criminally responsible, even when he has done all that he could to prevent an offence, affords some additional protection to the public because this will induce him to do more. But if he has done all he can how can he do more? I think that what lies behind this argument is a suspicion that justices too readily accept evidence that an employer has done all he can to prevent offences. But if justices were to accept as sufficient a paper scheme and perfunctory efforts to enforce it they would not be doing their duty—that would not be 'due diligence' on the part of the employer. Then it is said that this would involve discrimination in favour of a large employer like the appellants against a small shopkeeper. But that is not so. Mr Clement was the 'opposite number' of the small shopkeeper and he was liable to prosecution in this case. The purpose of this Act must have been to penalise those at fault, not those who were in no way to blame.

The Divisional Court decided this case on a theory of delegation. In that they were following some earlier authorities. But they gave far too wide a meaning to delegation. I have said that a board of directors can delegate part of their functions of management so as to make their delegate an embodiment of the company within the sphere of the delegation. But here the board never delegated any part of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also to take orders from their superiors. The acts or omissions of shop managers were not acts of the company itself.

In my judgment the appellants established the statutory defence. I would therefore allow this appeal.

**LORD MORRIS OF BORTH-Y-GEST:** The main question which is raised in this appeal is whether, on the findings of fact of the justices, the appellants, Tesco Supermarkets Ltd ('the company') established a defence under the provisions of s 24 (1) of the Trade Descriptions Act 1968. The terms of s 24 (1) are as follows:

'In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information

supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.'

There were 'proceedings for an offence under' the Act. The company was the 'person charged'. The Case Stated finds that the company is 'a nationally known public company who own many hundred stores'. There are at least 230 such stores in the north. In one of these, on 26th September 1969, there was in the window (and there had been for some days previously) a poster which proclaimed that a customer could purchase a certain package for 1s less than its normal price of 3s 11d. An advertisement so stating had appeared in local and national newspapers. For a number of days prior to 26th September there had been displayed in the particular store and on a separate fixture a number of the packages on each of which was the legend '1s off recommended price'. But at 10.00 am on 26th September there were no packages so marked. Packages of that variety were displayed for sale—but each had a price marking of 3s 11d; they were on a shelf which had a price marking of 3s 11d. It was at 10.00 am that a customer searched the store for one of the packages at the price of 2s 11d. He had expected to find one at that reduced price. He could not. He could only find those at the marked price of 3s 11d. He took one of those and asked its price of the cashier. Being informed that there were none of the packages in stock for sale at 2s 11d he was charged and paid the higher price.

A breakdown in the system had occurred. During the period of a special offer all packages marked with the normal price should have been removed from display. If any special offer stock was sold out the manager should have been so informed in order that he could remove any display notice that would be misleading. Actually on the evening of 25th September an assistant had noticed that none of the special offer packages remained on display; she had thereupon filled the appropriate fixture with packages having the marked price of 3s 11d; she had not reported to the manager either the dearth of packages marked 2s 11d or her action in placing in the fixture those marked 3s 11d. The manager had over-estimated his stock of packages at the reduced price; he thought that four cases were full which were in fact empty. Furthermore, the manager did not check the fixture on 26th September though in his weights and measures book for that morning there was an entry 'All special offers OK'. Had he realised that the store had sold out of the reduced price packages he would either have removed that part of the poster which related to them or he would have reduced the price of the packages in the store to 2s 11d. The store was, on the date in question, displaying for sale many thousands of different lines including many which were offered at reduced prices (referred to as 'flash' offers).

On the facts as found it appeared, therefore, that an offence had been committed. There had been a misleading indication as to price. It is provided by s 11 (2) of the Act as follows:

'If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.'

There was an indication which was likely to be taken as an indication that the packages in question were being offered at 2s 11d whereas the customer in the shop found that they were being offered at 3s 11d. So the question arises as to who was guilty of an offence. An information was preferred against the appellants for that they in offering to supply the package gave an indication by means of a notice bearing

a statement that the goods were being offered at a price less than that at which they were in fact being offered (i.e. s 11D).

It has been suggested that the appellants could not be held to have committed the offence. In this connection reference may be made to a passage in the judgment of VISCOUNT READING CJ in *Mousell Brothers v London and North-Western Ry* (1) where he said:

'Prima facie, then, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not a party to, the forbidden act done by his servant. Many statutes are passed with this object. Acts done by the servant of the licensed holder of licensed premises render the licensed holder in some instances liable, even though the act was done by his servant without the knowledge of the master. Under the Food and Drugs Acts there are again instances well known in these courts where the master is made responsible, even though he knows nothing of the act done by his servant, and he may be fined or rendered amenable to the penalty enjoined by the law. In those cases the legislature absolutely forbids the act and makes the principal liable without a mens rea.'

It will have been seen, however, that under s 11 (2) it is only 'subject to the provisions of' the Act that a person is guilty of an offence. The Act provides for certain defences which the person charged may prove; if he proves one of them then he is not guilty. The terms of s 24 (1) of the Act have been set out above. Subsection (2) imposes a requirement of serving a notice in cases where the defence involves attributing the offence to the act or default of another person or to reliance on information supplied by another person; the notice is to the prosecutor and it must give information identifying (or assisting to identify) that other person. The company gave the requisite notice. It was to the effect that the contravention of s 11 (1) was due to the act or default of the manager of the store in question.

But for one point the justices would have found that the defence was proved: but for that one point they would have acquitted the company. They found (i) that the company had established that the commission of the offence was due to the act or default of the manager of the store by his failure to see that the company's policy was correctly carried out and/or to correct the errors of the staff under him, and (ii) that the company had proved that they had taken all reasonable precautions and had exercised all due diligence to avoid the commission of the offence under s 11 (2) either by themselves or by any person under their control. They had exercised all due diligence in devising a proper system for the operation of the store and by securing as far as was reasonably practicable that it was fully implemented. In the careful and ample Statement of Case the magistrates set out in much detail their reasons for arriving at these conclusions. They need not be here repeated. Suffice it to say that the Case describes the system of administration and the various steps taken by the company to ensure that the manager was instructed and continuously and fully instructed in regard to the proper management of the store. There was a careful and reasonable system of selection of managers. Furthermore, the Case describes in detail the various steps taken by the company in the exercise of supervision over the manager and the proper running of the store. The manager of the store had under him an assistant manager and there were various section heads; the total number of the staff in the store was 60. It was found that the company had provided adequate staff and equipment for the running of the store. Then

(1) 81 JP 305; [1917] 2 KB 836; [1916-17] All ER Rep 110.

there was a 'ladder of responsibility' of those whose work was that of supervision. Thus there were branch inspectors whose duties (involving regular attendances) were solely those of supervision in regard to some six or eight stores. There were area controllers who in regard to some 24 stores supervised the branch inspectors as well as the managers and the operation of such stores; their duties also involved regular attendance at stores. There was a regional director who was responsible for a number of stores and the supervision of the area controllers, branch inspectors and managers for them.

The one point which resulted in the conviction rather than the acquittal of the company was that the justices were not satisfied that the manager was 'another person' within the meaning of s 24 (1) (a). They considered that the manager represented the company in his supervisory capacity and that the company were responsible for his lack of diligence in that capacity with the result that he was not 'another person'. They considered that the 'original act or default' had been that of a lady on the staff at the store and that the 'act or default' of the manager lay in his failure to instruct her or supervise her.

A point had been argued before the justices whether an offence under s 11 (2) had been made out. They considered that it had. They stated two questions for the opinion of the High Court, i.e. (i) whether they were correct in concluding that an offence under s 11 (2) had been made out and (ii) whether they were correct in concluding that the manager was not 'another person' within the meaning of s 24 (1) (a). The Divisional Court held that they were correct in regard to (i) and that matter was not pursued before your Lordships. In regard to (ii) it was accepted by the respondent in the Divisional Court, and it was common ground, that the manager was 'another person' within the meaning of s 24 (1) (a). It was said that where a defendant is an individual then any other individual could be 'another person' and that where a defendant is a company or corporate body then any individual could be 'another person' provided that he is not a person within s 20 carrying out functions as such person. Section 20 is in the following terms:

'(1) Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

'(2) In this section "director", in relation to any body corporate established by or under any enactment for the purpose of carrying on under national ownership any industry or part of an industry or undertaking, being a body corporate whose affairs are managed by the members thereof, means a member of that body corporate.'

It was held that the word 'manager' in that section denoted someone managing the affairs of the company rather than someone in the position of the manager of a store as in the present case.

On those conclusions it would have followed that on the Case as stated the appeal would have been allowed. The Divisional Court, however, took the view and they were invited to take the view that the magistrates had not applied their minds to the 'real question' which arose. The Divisional Court considered that that question was whether the defence under s 24 (1) was open to the appellants in view of the finding of the justices that the manager had been guilty of a failure in his duty of supervision of the staff under him in the store. On the assumption that the appellants had set up an efficient system, or one that could not be criticised, the Divisional

Court considered that the question arose whether the company was deprived of a defence under s 24 (1) if it was shown that there was a failure by someone to whom the duty of carrying out the system was 'delegated' properly to carry out that function. As the Divisional Court considered that all the facts were sufficiently found so that the 'real question' could be answered even though it was not a question raised, and as they considered that the manager of the store was a person to whom the company had, in respect of that particular store, 'delegated' their duty to take all reasonable precautions and to exercise all due diligence to avoid the commission of an offence, they concluded that it was impossible for the magistrates to find that the company had satisfied the requirements of s 24 (1) (b). Accordingly, they dismissed the appeal. In granting leave to appeal the court certified the point of law of public general importance in the following terms:

'Whether a person charged with an offence under s 11 (2) of the Trade Descriptions Act 1968 in a retail shop owned by him would have a defence under s 24 (1) of the said Act if (a) he instituted an efficient system to avoid the commission of offences under the Act by any person under his control; (b) he reasonably delegated to the manager of the shop the duty of operating the said system in that shop; (c) the manager failed to perform such duty efficiently; (d) the offence charged was committed by reason of such failure; (e) such failure by the said manager is the "act or default of another person" relied on under s 24 (1) (a).'

My Lords, we are here only concerned with the question whether the company committed an offence. If the nature of the offence under s 11 (2) was such that, under the perhaps rather exceptional principle already referred to, the company could be held to be guilty of it—it would only be guilty if it failed to prove one of the defences available under s 24 (1). If it is accepted that 'the commission of the offence' was due to 'the act or default of another person' then the company would have a defence (and so be entitled to be acquitted) if it further proved that it (i.e. the company) took all reasonable precautions and exercised all due diligence to avoid the commission of the offence either by itself or by any person under its control. It is here that it is important to remember that it is the criminal liability of the company itself that is being considered. In general criminal liability only results from personal fault. We do not punish people in criminal courts for the misdeeds of others. The principle of *respondet superior* is applicable in our civil courts but not generally in our criminal courts. So the sole issue in the present case is whether 'the company' took all reasonable precautions and exercised all due diligence. We are not concerned to express any opinion whether some other or which other person was by reason of the terms of s 11 and of s 23 guilty of an offence.

How, then, does a company take all reasonable precautions and exercise all due diligence? The very basis of s 24 involves that some contraventions of the Act may take place and may be contraventions by persons under the control of the company even though the company itself has taken all reasonable precautions and exercised all due diligence and that the company will not be criminally answerable for such contraventions. How, then, does a company act? When is some act the act of the company as opposed to the act of a servant or agent of the company (for which, if done within the scope of employment, the company will be civilly answerable)? In *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1) VISCOUNT HALDANE LC said:

'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently

(1) [1915] AC 705; [1914-15] All ER Rep 280.



be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.'

Within the scheme of the Act now being considered an indication is given (which need not necessarily be an all-embracing indication) of those who may personify 'the directing mind and will' of the company. The question in the present case becomes a question whether the appellants as a company took all reasonable precautions and exercised all due diligence. The justices so found and so held. The justices found and held that 'they' (i.e. the company) had satisfied the provisions of s 24 (1) (b). The reason why the Divisional Court felt that they could not accept that finding was that they considered that the company had delegated its duty to the manager of the shop. The manager was, they thought, a person to whom the appellants had delegated in respect of that particular shop their duty to take all reasonable precautions and exercise all due diligence to avoid the commission of an offence. Though the justices were satisfied that the company had set up an efficient system there had been 'a failure by someone to whom the duty of carrying out the system was delegated properly to carry out that function'.

My Lords, with respect I do not think that there was any feature of delegation in the present case. The company had its responsibilities in regard to taking all reasonable precautions and exercising all due diligence. The careful and effective discharge of those responsibilities required the directing mind and will of the company. A system had to be created which could rationally be said to be so designed that the commission of offences would be avoided. There was no delegation of the duty of taking precautions and exercising diligence. There was no such delegation to the manager of a particular store. He did not function as the directing mind or will of the company. His duties as the manager of one store did not involve managing the company. He was one who was being directed. He was one who was employed but he was not a delegate to whom the company passed on its responsibilities. He had certain duties which were the result of the taking by the company of all reasonable precautions and of the exercising by the company of all due diligence. He was a person under the control of the company and on the assumption that there could be proceedings against him, the company would by s 24 (1) (b) be absolved if the company had taken all proper steps to avoid the commission of an offence by him. To make the company automatically liable for an offence committed by him would be to ignore the subsection. He was, so to speak, a cog in the machine which was devised: it was not left to him to devise it. Nor was he within what has been called the 'brain area' of the company. If the company had taken all reasonable precautions and exercised all due diligence to ensure that the machine could and should run effectively, then some breakdown due to some action or failure on the part of 'another person' ought not to be attributed to the company or to be regarded as the action or failure of the company itself for which the company was to be criminally responsible. The defence provided by s 24 (1) would otherwise be illusory.

In reaching their conclusion, the Divisional Court placed reliance on and followed the decision in *Series v Poole* (1). In that case the holder of a carrier's licence was charged with failing, contrary to s 186 of the Road Traffic Act 1960, properly to keep current

(1) [1967] 3 All ER 849; [1969] 1 QB 676.



records. The records were in fact defective but the licence holder had employed someone to check the records. He had instructed such employee as to the method of checking the records: he had supervised the work of such employee until he was satisfied that the system was working well. The justices found that he had used all due diligence to secure compliance with the relevant statutory provisions. Provided that this finding could on the facts be supported I see no reason why the Divisional Court should have denied to him the defence which by s 20 of the Road Traffic Act 1962 was made available. On the justices' finding I consider that the acquittal should have been allowed to stand. The licence holder had not washed his hands of his responsibilities; he had used all due diligence to see that they were discharged so that there should be compliance with the provisions of the Act.

In *R C Hammett Ltd v London County Council* (1) employers were denied the defence available under s 12 (5) of the Sale of Food (Weights and Measures) Act 1926 on the ground that the manager of a shop had not shown due diligence though the employers themselves had in all other respects used due diligence. I do not think that that case was rightly decided.

On the facts as found and by the application of s 24 (1) I consider that the company should have been absolved from criminal liability. Accordingly, I would allow the appeal.

**VISCOUNT DILHORNE:** On 3rd February 1970, the appellants were convicted at the magistrates' court at Northwich of an offence under s 11 (2) of the Trade Descriptions Act 1968 which provides:

'If any person offering to supply goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.'

On 26th September 1969, the appellants had a poster attached to the window of their supermarket in Northwich bearing the words 'Radiant 1s off. Giant Size 2s 11d'. This meant, and could only have been taken to mean, that giant size packs of Radiant washing powder were being offered for sale at that price. The appellants had also advertised that these packs were being offered for sale at this price in local and national newspapers. An old age pensioner sought to purchase one of these packs, but he was only able to find displayed in the supermarket packs marked with the price of 3s 11d. He took one of these to the cashier who told him that there were no packs for sale at 2s 11d and he was charged 3s 11d. He immediately complained to the inspector of weights and measures. On proof of these facts the justices were right to convict the appellants if they had not succeeded in establishing one of the defences open to them under s 24 of the Trade Descriptions Act 1968. Subsections (1) and (2) of s 24 are in the following terms:

'(1) In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

'(2) If in any case the defence provided by the last foregoing subsection involves the allegation that the commission of the offence was due to the act or default

of another person or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless, within a period ending seven clear days before the hearing, he had served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.'

The appellants gave notice as required by this subsection, alleging that the commission of the offence was due to the act or default of a Mr Clement, the manager of their supermarket at Northwich. They were consequently entitled to an acquittal if they proved that, and also that they had taken all reasonable precautions and had exercised all due diligence to avoid the commission of the offence by Mr Clement.

What had happened was that on the evening before the commission of the offence Miss Rogers, a shop assistant, whose duty it was to put the packs on display for sale, had discovered that there were no packs displayed for sale at 2s 11d and no packs marked with that price available for display. She had, therefore, put out packs marked with the price of 3s 11d. She had not reported to Mr Clement that there were no 2s 11d packs to display. It was his duty to check the display of the special offers and to enter in a book that he had done so. In the entry for 26th September he had written 'All special offers OK' when in fact the special offer of Radiant giant size packs was not, as no such packs were being offered for sale at 2s 11d a pack.

The justices found that—

'the original act or default was that of Miss Rogers and the act or default of the said Clement was in his failure to instruct or supervise her [and that] the commission of the offence was due to the act or default of the said Clement by his failure to see that the appellants' policy was correctly carried out and/or to correct the errors of the staff under him.'

The justices held that the appellants had exercised all due diligence in devising a proper system for the operation of the store and by securing, so far as was reasonably practicable, that it was fully implemented and thus had fulfilled the requirements of s 24 (1) (b). Although they did not in terms say so, they clearly meant that the appellants had, as well as exercising all due diligence, taken all reasonable precautions to avoid the commission of the offence. They, however, held that Mr Clement was not 'another person' within the meaning of s 24 (1) (a) and so that the statutory defence failed. The Divisional Court held that they were right to convict but wrong to conclude that Mr Clement was not 'another person'. In their view, the appellants had delegated to Mr Clement 'their duty of taking all reasonable precautions and exercising all due diligence' and consequently his failure to do so was failure by the appellants.

Section 23 of the Act is in the following terms:

'Where the commission by any person of an offence under this Act is due to the act or default of some other person that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first-mentioned person.'

These provisions in the Act make its policy clear. To secure a conviction for an offence under s 11 (2), the prosecutor is relieved of the burden of proving any intent on the part of any person. If that burden rested on him, it might often prove very difficult to discharge. It suffices to prove (a) that the accused was offering the goods and (b) that, at the time he did so, an indication had been given that the goods were

being offered at a price less than in fact was the case. That could happen without the person offering the goods being in any way to blame. Parliament, therefore, provided the accused person with a number of defences and cast on him the burden of establishing his innocence. If he was going to allege that the events which took place and amounted to the commission of the offence were due to the act or default of another or in consequence of information supplied by another person, he had to comply with s 24 (2) and then it would be open to the authorities to charge that other person, if they thought fit, but, whether or not another person is charged, the accused is entitled to be acquitted if he proves that he took all reasonable precautions, and exercised all due diligence to prevent the commission of the offence and that it was due to the act or default of another or, if that is the defence put forward, in consequence of information supplied by another.

Difficulties may arise with regard to the interpretation of s 23. The offence may have been committed as the result of the act or default of another without that other person having done the acts which constitute the offence. Here the justices found that the original act or default was that of Miss Rogers, but she does not appear to have had any responsibility for the poster in the window indicating that the packs were for sale at less than 3s 11d. Mr Clement, on the other hand, was responsible for the poster in the window, but he had not displayed or authorised the display of the packs for sale at the price of 3s 11d; and if, despite the notice, no such packs had been displayed for sale, no offence under s 11 (2) would have been committed. In this case the justices found not that Mr Clement had committed or had been party to the offence but that it had occurred through his failure to carry out the appellants' policy and/or to correct the errors of his staff.

The language of the first part of s 23 might be understood to mean that on the facts of this case, if Miss Rogers or Mr Clement had been prosecuted, they would have been convicted though neither of them had done the acts which constitute the offence. In this case one has not to decide that question, and s 23 is only relevant with regard to the meaning to be given to the words 'act or default of another person' in s 24 (1) (a). In that subsection, whatever they may mean in s 23, they must be given their literal meaning. To succeed on this defence it is not necessary to show that some other person did the acts which constitute the offence. It will suffice to show that the acts were done as a result of an act or default of another person.

If the chain of supermarkets owned and run by the appellants, some 800 we were told, were owned and run by an individual or partnership, then it could not be disputed that Mr Clement was another person within the meaning of the subsection. Does he cease to be 'another person' because the stores are owned by a limited company? Further, if the stores were owned and run by an individual or partnership and that individual or the partners had themselves exercised all due diligence, is it right that they should be held not to have done so because a shop manager of theirs has not done so? And has the statute here to be interpreted differently where a company is accused than where the accused is an individual? *Prima facie* one would have thought it unlikely that Parliament intended 'another person' to have a different meaning in relation to a company from that in relation to an individual or that the ambit of s 24 (1) (b) should differ depending on whether the owner of the shop was a company or individual.

In *R C Hammett Ltd v Crabb*, *R C Hammett Ltd v Beldam* (1) LORD HEWART CJ and AVORY J held, in relation to the Sale of Food (Weights and Measures) Act 1926, that whether or not the principal charged had exercised due diligence was a question of fact in every case. In that case as in this the accused company was seeking as a matter of defence to prove due diligence. In this case as in that, in my opinion, the questions whether there

(1) (1931), 95 JP 180.

was due diligence and whether all reasonable precautions were taken are questions of fact.

*R C Hammett Ltd v London County Council* (1) appears to be the first reported case where the extent of a statutory defence similar in many respects to that in this case was considered. There the prosecution was under the Sale of Food (Weights and Measures) Act 1926. There the Divisional Court (LORD HEWART CJ, AVORY and ACTON JJ) dismissed the appeal against conviction on the ground that there was evidence on which quarter sessions could arrive at the opinion that due diligence was not used by the shop manager, an assistant at the shop being the actual offender, and that for the purpose of the Act the company was responsible for the absence of due diligence on his part though in all other respects the company had exercised due diligence.

LORD HEWART distinguished this case from the earlier *Hammett* case (2) on the ground that in that case the evidence was clear that there was due diligence on the part of everybody down to the very person who had committed the act. He held that the justices were entitled to come to the conclusion that for that lack of due diligence the appellants were responsible. I do not myself regard this as a satisfactory decision. No authorities were cited for the proposition that the company could not establish that they had acted with due diligence if a shop manager of theirs had not exercised due diligence, and, in relation to this defence, the question is not: Was the company responsible for the act of its servant and for his omissions?, but whether due diligence had been exercised by the company.

In the course of the argument a great many cases were cited with regard to the criminal liability of a company. A company can only act through individuals, and it is well established that a company can be criminally liable even if the offence involves proof of an intent (*Mousell Brothers v London and North-Western Ry Co* (3) and *Director of Public Prosecutions v Kent & Sussex Contractors Ltd* (4)). If an offence under s 11 (2) is committed by a company, the acts necessary to constitute the offence must have been done by individuals in their employ. Here the question is not whether the company is criminally liable and responsible for the act of a particular servant but whether it can escape from that liability by proving that it exercised all due diligence and took all reasonable precautions and that the commission of the offence was due to the act or omission of another person. That, in my view, is a very different question from that of a company's criminal responsibility for its servants' acts.

The Act does not exclude a person in the employ of a company from being 'another person'. In *Beckett v Kingston Bros. (Butchers) Ltd* (5) it was argued that it did. That argument was rejected by BRIDGE J, and rightly, in my opinion. If it had prevailed, the statutory defence would seldom avail an accused company for seldom would it be possible to prove that the act or default was that of someone not employed by the company.

In *Series v Poole* (6), a case decided in 1967 which does not appear to have been cited to the court in *Beckett v Kingston Bros. Ltd*, the appeal to the Divisional Court was from the dismissal of an information for an offence under regulations made under the Road Traffic Act 1960 alleging that the accused unlawfully failed to cause to be kept a current record of the driving periods of his driver. The Road Traffic Act 1962, by s 20, provided that it should be a defence to prove in such proceedings that the accused had used all due diligence to secure compliance with the regulation. While I think that on the facts it would be difficult to say that the accused had exercised all

(1) (1933), 97 JP 105.

(2) (1931), 95 JP 180.

(3) 81 JP 305; [1917] 2 KB 836; [1916-17] All ER Rep 110.

(4) 108 JP 1; [1944] 1 All ER 119; [1944] KB 146.

(5) 134 JP 270; [1970] 1 All ER 715; [1970] 1 QB 606.

(6) [1967] 3 All ER 849; [1969] 1 QB 676.

due diligence, that was not the ground on which the appeal by the prosecutor was allowed. LORD PARKER CJ, with whose judgment SALMON and WIDGERY LJJs agreed, regarded the 'absolute obligation under s 186 (1) of the Act of 1960' as a personal obligation which an individual could not evade by delegating it to someone else. I do not in the least wish to criticise this. Section 186 of the 1960 Act under which the prosecution was brought created an absolute obligation and as the law stood prior to 1962 what he said was clearly right. By the Road Traffic Act 1962 Parliament qualified that absolute obligation and for the first time provided a defence dependent on proof of the exercise of due diligence by the accused. That could not be established merely by showing that a good system had been devised and a person thought to be competent put in charge of it. It would still be necessary to show due diligence on the part of the accused in seeing that the system was in fact operated and the person put in charge of it doing what he was supposed to do. From May to September 1966 the accused does not appear to have taken any steps to ascertain whether the person he had put in charge was doing what she had been instructed to do. If he had taken any steps, he would have found that she was not, and that is why I have said that on the facts in that case it would be difficult to say that the exercise of due diligence had been proved. LORD PARKER said that a man under the duty imposed by s 186 might reasonably appoint someone else to perform his duty 'his alter ego' and in that case it seemed to him that if the alter ego failed in his duty the employer is liable. He went on to say that to rely on a defence under s 20 of the 1962 Act an employer must show that the alter ego has observed due diligence.

That an employer, whether a company or an individual, may reasonably appoint someone to secure that the obligations imposed by the Act are observed cannot be doubted. Only by doing so can an employer who owns and runs a number of shops or a big store hope to secure that the Act is complied with, but the appointment by him of someone to discharge the duties imposed by the Act in no way relieves him from having to show that he has taken all reasonable precautions and has exercised all due diligence if he seeks to establish the statutory defence. He cannot excuse himself if the person appointed fails to do what he is supposed to do unless he can show that he himself has taken such precautions and exercised such diligence. Whether or not he has done so is a question of fact and while it may be that the appointment of a competent person amounts in the circumstances of a particular case to the taking of all reasonable precautions, if he does nothing after making the appointment to see that proper steps are in fact being taken to comply with the Act, it cannot be said that he has exercised all due diligence. I do not think that the Act is so narrowly drawn that to rely on the defence under s 24 an employer must show that the alter ego has observed due diligence. That is not, in my opinion, what the Act provides. He has to show that he used due diligence, and it does not suffice for him to show that others did so.

LORD PARKER's reference to an alter ego may have had its origin in the statement by VISCOUNT HALDANE LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1). He said:

'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under

(1) [1915] AC 705; [1914-15] All ER Rep 280.



the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.'

Following this, DENNING LJ in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* (1) said:

'A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.'

If, when DENNING LJ referred to directors and managers representing the directing mind and will of the company he meant, as I think he did, those who constitute the directing mind and will, I agree with his approach.

These passages, I think, clearly indicate that one has in relation to a company to determine who is or who are, for it may be more than one, in actual control of the operations of the company, and the answer to be given to that question may vary from company to company depending on its organisation. In my view, a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders, cannot be regarded as 'another person' within the meaning of ss 23 and 24 (1) (a). Section 20 provides that where an offence under the Act has been committed by a body corporate and is proved to have been committed with the consent or connivance or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the company, is to be guilty of the offence. Parliament by this section may have attempted to identify those who normally constitute the directing mind and will of a company and by this section have sought to make clear that although they are not other persons coming within s 23 and 24 (1) (a), they may still be convicted.

However this may be, shop managers in a business such as that conducted by the appellants—and their number may be of the order of 800 if the appellants have that number of shops—cannot properly be regarded as part of the appellants' directing mind and will and so can come within the reference to 'another person' in s 23 and 24 (1) (a).

In my opinion, the ratio decidendi in *R C Hammett Ltd v London County Council* (2) and in *Series v Poole* (3) was wrong. For the reasons I have stated in my view this appeal should be allowed.

**LORD PEARSON:** In September 1969, the appellants, Tesco Supermarkets Ltd ('the company') was selling giant size packets of Radiant washing powder at a price of 2s 11d, being a reduced price 1s below the price of 3s 11d which was the ordinary price normally recommended by the manufacturers. Affixed to the window of the company's shop at Northwich in Cheshire was a large poster, of which the upper part bore the legend 'Radiant 1s. off Giant Size 2s. 11d.' Advertisements to the same effect had been inserted in local and national newspapers. Initially there was at the

(1) [1956] 3 All ER 624; [1957] 1 QB 159.

(2) (1933), 97 JP 105.

(3) [1967] 3 All ER 849; [1969] 1 QB 676.



shop a stock of 'flash packs', that is to say, giant size packets of the washing powder bearing the legend '1s. off recommended price'. Things went wrong on 25th and 26th September 1969. The stock of such 'flash packs' was exhausted. On the evening of 25th September Miss Rogers, an assistant at the shop, discovered that no such 'flash packs' remained on display, and she filled up the 'fixture' with ordinary packets of the washing powder marked with the ordinary price of 3s 11d and she failed to inform the shop manager, Mr Clement, of the dearth of flash packs or the action which she had taken. Mr Clement failed to check the washing powder 'fixture' on 26th September, notwithstanding his entry in his weights and measures book for that morning: 'All special offers OK'. On the morning of 26th September a customer entered the shop expecting to find a 'flash pack' at 2s 11d, but was able to find only a packet offered at the ordinary price of 3s 11d, and he had to buy it at that price.

The relevant provisions of the Trade Descriptions Act 1968 are as follows:

Section 11: '(2) If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence . . .

'20. (1) Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly . . .

'23. Where the commission by any person of an offence under this Act is due to the act or default of some other person that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first-mentioned person.

'24. (1) In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control . . .'

In my opinion, the first conclusions to be drawn from the application of these provisions to the facts of the present case are as follows: (i) An offence was committed under s 11 (2). (ii) Prima facie the company has committed and is liable for the offence, because the company through its servants offered to supply the goods and gave the indication of the reduced price. The case is similar to *Coppen v Moore* (1), decided under the Merchandise Marks Act 1887, s 2, where LORD RUSSELL OF KILLOWEN CJ said:

'The question, then, in this case, comes to be narrowed to the simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servants in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In our judgment it was clearly the

(1) 62 JP 453; [1898] 2 QB 306; [1895-99] All ER Rep 926.

intention of the legislature to make the master criminally liable for such acts, unless he was able to rebut the prima facie presumption of guilt by one or other of the methods pointed out in the Act.'

Also relevant is the judgment of LORD GODDARD CJ in *Melias Ltd v Preston* (1). (iii) In the present case the company was the master of the persons who committed the acts or defaults whereby the offence was committed, and as in *Coppen v Moore* the company may rebut the presumption of guilt in one or other of the methods pointed out by the Act. Section 11 (2) is expressly made 'subject to the provisions of this Act' and therefore is subject to s 24 (1). The company has sought to prove under s 24 (1) (a) that 'the commission of the offence was due . . . to the act or default of another person', naming Mr Clement as the other person. In order to complete its defence the company must also prove that the company took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by itself or any person under its control. The question in this appeal is whether the company has proved those two points.

Your Lordships are not concerned in this appeal with the questions whether Miss Rogers and Mr Clement or either of them could be held liable under s 23 for the commission of the offence, and whether they or either of them would have a defence under s 24. I express no opinion on those questions.

The justices have said in the Case Stated that they were of opinion that:

'(ii) the commission of the offence was due to the act or default of the said Clement by his failure to see that the appellants' policy was correctly carried out and/or to correct the errors of the staff under him; (iii) the appellants had exercised all due diligence in devising a proper system for the operation of the said store and by securing so far as was reasonably practicable that it was fully implemented and thus had fulfilled the requirements of s 24 (1) (b); (iv) the appellants could not rely upon the act or default of the said Clement as he was not "another person" within the meaning of s 24 (1) (a) . . .'

In giving their reasons for the opinion in (iv) they said that they reached the conclusion that the original act or default was that of Miss Rogers and the act or default of Mr Clement was in his failure to instruct or supervise her; Mr Clement represented the company in his supervisory capacity and for his lack of due diligence the company was responsible on the principle laid down in *R C Hammett Ltd v London County Council* (2); accordingly, Mr Clement was not 'another person' for the purposes of s 24 (1) (a) of the Act.

The justices' opinion that Mr Clement was not 'another person'—a person other than the company—seems to me to be clearly unsustainable. It would be immediately obvious in the case of an individual proprietor of a business and the manager of one of his shops. It is less obvious in the case of a company which can only act through servants or agents and has generally in the law of tort and sometimes in criminal law vicarious responsibility for what they do on its behalf. But vicarious responsibility is very different from identification. There are some officers of a company who may for some purposes be identified with it, as being or having its directing mind and will, its centre and ego, and its brains: *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (3); *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* (4) and *The Lady Gwendolen* (5). The reference in s 20 of the Trade Descriptions Act 1968 to 'any

(1) 121 JP 444; [1957] 2 All ER 449; [1957] 2 QB 380.

(2) (1933), 97 JP 105.

(3) [1915] AC 705; [1914-15] All ER Rep 280.

(4) [1956] 3 All ER 624; [1957] 1 QB 159.

(5) [1965] 2 All ER 283; [1965] P 294.

director, manager, secretary or other similar officer of the body corporate' affords a useful indication of the grades of officers who may for some purposes be identifiable with the company, although in any particular case the constitution of the company concerned should be taken into account. With regard to the word 'manager' I agree with FISHER J who said in his judgment in the present case that the word refers to someone in the position of managing the affairs of the company, and would not extend to include a person in the position of Mr Clement. In the present case the company has some hundreds of retail shops, and it would be far from reasonable to say that every one of its shop managers is the same person as the company.

The Divisional Court, although they affirmed the conviction and dismissed the company's appeal, took a view that was different from that of the justices. They held that Mr Clement was 'another person' distinct from the company, so that the company proved its point under para (a) of s 24 (1). But they held that the company failed under para (b). Their reasoning was that, although the company had devised a proper system for taking precautions and exercising due diligence to avoid the commission of an offence, the company had delegated the function of operating the system to employees, of whom Mr Clement was one; that Mr Clement had operated the system negligently; the company was responsible for the negligent operation of the system by one of its delegates; and so the company failed to prove that it had taken all reasonable precautions and exercised all due diligence to prevent the commission of the offence. Some extracts from the judgment of FISHER J will show clearly how the Divisional Court reached their conclusion. He said:

'The taking of such precautions and the exercise of such diligence involves, or may involve, two things. First of all, it involves the setting up of an efficient system for the avoidance of offences under the Act. Secondly, it involves the proper operation of that system. Inevitably the second part, the operation of the system, will in most cases have to be delegated by the company to employees falling outside those mentioned in s 20. The question which this court has to consider is whether a company can be said to have satisfied the requirements of s 24 (1) (b) if it satisfies the justices that it has set up an efficient system, or a system which cannot be criticised, or whether it is deprived of the defence under that section if it is shown that there has been a failure by someone to whom the duty of carrying out the system was delegated properly to carry out that function.'

Later he said:

'if it be the case that Mr Clement was a person to whom the appellants had delegated in respect of that particular shop their duty to take all reasonable precautions and exercise all due diligence to avoid the commission of such an offence, and if Mr Clement had failed properly to carry out that duty, then the appellants are unable to show that they have satisfied s 24 (1) (b).'

The conclusion was:

'It seems clear to me that a person in the position of Mr. Clement, the manager of a shop, a supermarket, is properly to be considered as being a person to whom the appellants had, so far as concerned that shop, delegated their duty of taking all reasonable precautions and exercising all due diligence to avoid the commission of an offence; and it seems to me that in the light of the findings which I have just read, it was impossible for the justices to find that the appellants had satisfied the requirements of s 24 (1) (b).'

FISHER J also cited *Series v Poole* (1) in which it was held that the defendant was liable under s 186 of the Road Traffic Act 1960 and had failed to prove a defence under s 20

(1) [1967] 3 All ER 849; [1969] 1 QB 676.

<b>LOCAL GOVERNMENT</b> – Merger of council with other councils to form county borough – Loss of employment of clerk and solicitor – Re-settlement and long term compensation – Local Government (Compensation) Regulations, 1963, regs 8, 14 (1) (c) (f). <b>Myrddin-Baker v Teesside County Borough Council.</b> . . . . .	<b>QBD</b>	<b>152</b>
<b>MAGISTRATES</b> – Committal to quarter sessions for sentence – Application to change plea of guilty. <b>R v Mufford and Lotheringland Justices. Ex parte Harber. R v East Suffolk Quarter Sessions. Ex parte Harber</b> . . . . .	<b>QBD</b>	<b>107</b>
<b>MAGISTRATES</b> – Irish warrant – Endorsement – No inquiry whether prima facie case made out – Habeas corpus – Likelihood of prosecution or detention for political offence – Backing of Warrants (Republic of Ireland) Act, 1963, s 1 (2) (b). <b>R v Brixton Prison Governor. Ex parte Keane</b> . . . . .	<b>QBD</b>	<b>38</b>
<b>MAGISTRATES</b> – Natural justice – Magistrate acting in administrative or executive capacity – Duty to act openly, impartially and fairly – Seizure of sweet potatoes by local authority officer – Meeting between justice and local government officials before hearing – Box of sweet potatoes shown and sample cut open – Retirement at end of hearing of magistrate with public analyst and chief veterinary officer – Advice received, but not communicated to defendants – Food and Drugs Act, 1955, s 9 (3) – Colouring Matter in Food Regulations, 1966, reg 5 (1). <b>R v Birmingham City Justices. Ex parte Chris Foreign Foods (Wholesalers) Ltd</b> . . . . .	<b>QBD</b>	<b>73</b>
<b>QUARTER SESSIONS</b> – Appeal – Plea – Change of plea – Enquiry whether plea of guilty at magistrate's court equivocal – Right to remit case to magistrate – Quarter sessions entitled to consider only what happened before magistrate – Nothing in proceedings before magistrate casting doubt on plea. <b>R v Marylebone Magistrate. Ex parte Westminster City Council. R v Inner London Quarter Sessions. Ex parte Westminster City Council</b> . . . . .	<b>QBD</b>	<b>239</b>
<b>RACE RELATIONS</b> – Housing – Council houses – Tenants restricted to British subjects – Validity – Action for declarations by local authority – Competency – Race Relations Act, 1968, s 2 (1), s 19 (10). <b>London Borough of Ealing v Race Relations Board</b> . . . . .	<b>QBD</b>	<b>131</b>
<b>RATING</b> – Machinery and plant – Generation of power – Electric motors, hydraulic pumps, and air compressors – Motive power derived from electricity supplied to factory – Hydraulic and pneumatic power distributed throughout factory – Rating and Valuation Act, 1925, s 24 (1), Sched 3 (1) (a) – Plant and Machinery (Rating) Order, 1960, Sched. <b>Chesterfield Tube Co Ltd v Thomas (Valuation Officer)</b> . . . . .	<b>CA</b>	<b>1</b>
<b>RENT CONTROL</b> – Contract referred to tribunal – Entry upon consideration of reference – Papers considered by each member of tribunal individually – Assembly and visit to view premises – No admission obtained – Letter of withdrawal – Not operative till received by tribunal – Rent Act, 1968, s 73 (1). <b>R v Tottenham District Rent Tribunal. Ex parte Fryer Bros (Properties) Ltd</b> . . . . .	<b>QBD</b>	<b>94</b>
<b>ROAD TRAFFIC</b> – Driving test – Duty of examiner appointed by Ministry. <b>British School of Motoring Ltd v Simms and Another, Stafford Third Party</b> . . . . .	<b>Assizes</b>	<b>103</b>
<b>ROAD TRAFFIC</b> – Driving while disqualified – Outstanding offences taken into consideration – Similar offence. <b>R v Jones</b> . . . . .	<b>CA</b>	<b>36</b>
<b>ROAD TRAFFIC</b> – Driving with blood alcohol proportion above prescribed limit – Arrest without warrant – Powers of police to detain thereafter – Road Safety Act, 1967, ss 1, 2 (2), 2 (4), 3 (1), 4. <b>R v Mackenzie</b> . . . . .	<b>Assizes</b>	<b>26</b>
<b>ROAD TRAFFIC</b> – Driving with blood alcohol proportion above prescribed limit – Ascertainment of alcohol proportion – 'Ascertainment from laboratory test' – Drink consumed after cessation of driving – Adjustment of test – Road Safety Act, 1967, s 1 (1). <b>Rowlands v Hamilton</b> . . . . .	<b>HL</b>	<b>241</b>
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion exceeding prescribed limit – Attempting to drive – Car stopped by person wrongly believed by defendant to be police officer – Ignition keys handed over – Departure of defendant from car – Return – Demand for handing back of keys – Refusal – Subsequent breath test – Road Safety Act, 1967, s 1 (1). <b>Harman v Wardrop</b> . . . . .	<b>QBD</b>	<b>255</b>

<b>ROAD TRAFFIC</b> – Driving with blood alcohol proportion above prescribed limit – Provision of specimen – Blood – Analysis by ordinary equipment and skill – Gas chromatography. <b>Smith v Cole</b> .. .. .	<b>QBD</b>	<b>97</b>
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – Specimen for laboratory test – Failure to supply – Reasonable excuse – Excuse relating to blood specimen only – Liability to supply specimen of urine – Direction to jury – Road Safety Act, 1967, s 3 (3) (6). <b>R v Harling</b> .. .. .	<b>CA</b>	<b>29</b>
<b>STATUTE</b> – Construction – Purposive interpretation – Act providing minimum sentences for specified criminal offences. <b>Kennedy v Spratt</b> .. .. .	<b>HL</b>	<b>203</b>
<b>TOWN AND COUNTRY PLANNING</b> – Compulsory purchase – Compensation – Assessment – Application of Pointe Gourde principle to cases under Land Compensation Act, 1961, s 6 (1), Sched 1, part 1. <b>Wilson v Liverpool City Council</b> .. .. .	<b>CA</b>	<b>168</b>
<b>TOWN AND COUNTRY PLANNING</b> – Compulsory purchase – Compensation – Reference to Lands Tribunal – Agreement between parties as to basis of assessment – Subsequent decision of House of Lords that that basis wrong – Power of court to remit case to tribunal – Discretion. <b>Wilson v Liverpool City Council</b> .. .. .	<b>CA</b>	<b>168</b>
<b>TOWN AND COUNTRY PLANNING</b> – Permission – Refusal – Appeal to Minister – Decision in accordance with general policy – Need for genuine consideration of particular matter – Town and Country Planning Act, 1962, s 179 (1) (3) (b). <b>H Lavender and Son Ltd v Minister of Housing and Local Government</b> .. .. .	<b>QBD</b>	<b>186</b>
<b>TOWN AND COUNTRY PLANNING</b> – Permission – Refusal – Authority required to purchase land – Compensation – Assessment. <b>Margate Corporation v Devotwill Investments Ltd</b> .. .. .	<b>HL</b>	<b>19</b>
<b>TRADE DESCRIPTIONS</b> – Defence – Act or default of another person – ‘Another person’ – Company – Commission of offence through breach of duty of branch manager – Trade Descriptions Act, 1968, s 11 (2), s 24 (1). <b>Tesco Supermarkets Ltd v Natrass</b> .. .. .	<b>HL</b>	<b>289</b>
<b>TRADE DESCRIPTIONS</b> – Defence – ‘Mistake’ – ‘Act or default’ – Offence due to conduct of employee – Trade Descriptions Act, 1968, s 24 (1) (a). <b>Birkenhead and District Co-operative Society Ltd v Roberts</b> .. .. .	<b>QBD</b>	<b>194</b>
<b>TRADE DESCRIPTIONS</b> – False description – Milk – Foil cap on bottle accurately describing milk and bearing retailer’s name – Names of milk suppliers to whom bottle belonged embossed on bottle – Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1). <b>Donnelly v Rowlands</b> .. .. .	<b>QBD</b>	<b>100</b>
<b>TRADE DESCRIPTIONS</b> – False description – Sale of second-hand car – False number of miles on indicator – Defence – Reliance by defendants on information supplied to them – Act or default of another person – Failure to take all reasonable precautions or exercise all due diligence – Trade Descriptions Act, 1968, s 24 (1) (a), (b), (3). <b>London Borough of Richmond v Motor Sales (Hounslow) Ltd</b> .. .. .	<b>QBD</b>	<b>236</b>

of the Road Traffic Act 1962, when he had 'delegated' the checking of certain records to a lady secretary and she had been negligent in the performance of that task. In his judgment in that case LORD PARKER CJ had said:

'If I can go by stages, the absolute obligation . . . under s. 186 (1) of the Act of 1960 is a personal obligation, personal in this sense, that if [an employer] acting perfectly reasonably, puts some competent person in charge to perform his, the employer's duty, the employer remains liable if the servant fails in his duty . . . He may, as I have said, acting perfectly reasonably, appoint somebody else to perform his duty, his alter ego, and in that case, as it seems to me, if the alter ego fails in his duty the employer is liable. Equally, if the employer seeks to rely on the defence under s. 20, he must show that the alter ego has observed due diligence.'

Clearly the Divisional Court's decision was based on the theory of 'delegation'. One has to examine the meaning of the word 'delegation' in relation to the facts of this case and the provisions of the Trade Descriptions Act 1968, ss 11 (2) and 24. In one sense the meaning is as wide as the principle of the master's vicarious liability for the acts and omissions of his servants acting within the scope of their employment. In this sense the master can be said to 'delegate' to every servant acting on his behalf all the duties which the servant has to perform. But that cannot be the proper meaning here. If the appellants 'delegated' to Miss Rogers the duty of filling the fixture with appropriate packets of washing powder, and 'delegated' to Mr Clement the duty of supervising the proper filling of fixtures and the proper exhibition or withdrawal of posters proclaiming reduced prices, then any master, whether a company or an individual, must be vicariously liable for all the acts and omissions of all its or his servants acting on its or his behalf. That conclusion would defeat the manifest object of s 24 which is to enable defendants to avoid vicarious liability where they were not personally at fault.

Section 24 requires a dividing line to be drawn between the master and any other person. The defendant cannot disclaim liability for an act or omission of his ego or his alter ego. In the case of an individual defendant, his ego is simply himself, but he may have an alter ego. For instance, if he has only one shop and he appoints a manager of that shop with full discretion to manage it as he thinks fit, the manager is doing what the employer would normally do and may be held to be the employer's alter ego. But if the defendant has hundreds of shops, he could not be expected personally to manage each one of them and the manager of one of his shops cannot in the absence of exceptional circumstances be considered his alter ego. In the case of a company, the ego is located in several persons, e.g. those mentioned in s 20 of the Act or other persons in a similar position of direction or general management. A company may have an alter ego if those persons who are or have its ego delegate to some other person the control and management, with full discretionary powers, of some section of the company's business. In the case of a company, it may be difficult, and in most cases for practical purposes unnecessary, to draw the distinction between its ego and its alter ego, but theoretically there is that distinction. Mr Clement, being the manager of one of the company's several hundreds of shops, could not be identified with the company's ego nor was he an alter ego of the company. He was an employee in a relatively subordinate post. In the company's hierarchy there were a branch inspector and an area controller and a regional director interposed between him and the board of directors.

It was suggested in the argument of this appeal that in exercising supervision over the operations in the shop Mr Clement was performing functions of management and acting as a delegate and alter ego of the company. But supervision of the details



of operations is not normally a function of higher management; it is normally carried out by employees at the level of foremen, chargehands, overlookers, floor managers and 'shop' managers (in the factory sense of 'shop'). Also reference was made to *R C Hammett Ltd v London County Council* (1) in which, when the reported arguments are taken into account, the ground of decision appears to have been that, for the purposes of the Sale of Food (Weights and Measures) Act 1926, ss 5 (2) and 12 (5), the employer had to show due diligence on behalf of all the employees concerned except the actual offender. In my opinion, there was no justification for drawing the line of division between the company and its employees at that point, and the case was wrongly decided. As to *Series v Poole* (2), the decision of the Divisional Court seems to have been in accordance with the general merits of the case, but the treatment of the secretary as an alter ego of the employer is difficult to uphold, when she had merely been instructed by him to check the records and had failed to do so diligently. I would allow the appeal.

**LORD DIPLOCK:** This appeal turns on the meaning to be given to penal provisions contained in the Trade Descriptions Act 1968. The Act, which replaces the Merchandise Marks Act 1887 to 1953, is concerned with consumer protection. It is a criminal statute and creates a number of offences of giving inaccurate or inadequate information to customers in the course of business transactions relating to the supply of goods or services. Offenders are liable to a fine or to imprisonment for not more than two years or to both. Nowadays most business transactions for the supply of goods or services are not actually conducted by the person who in civil law is regarded as the party to any contracts made in the course of the business, but by servants or agents acting on his behalf. Thus, in the majority of cases the physical acts or omissions which constitute or result in an offence under the statute will be those of servants or agents of an employer or principal on whose behalf the business is carried on. That employer or principal is likely to be very often a corporate person, as in the instant appeal. Consumer protection, which is the purpose of statutes of this kind, is achieved only if the occurrence of the prohibited acts or omissions is prevented. It is the deterrent effect of penal provisions which protects the consumer from the loss he would sustain if the offence were committed. If it is committed he does not receive the amount of any fine. As a taxpayer he will bear part of the expense of maintaining a convicted offender in prison. The loss to the consumer is the same whether the acts or omissions which result in his being given inaccurate or inadequate information are intended to mislead him, or are due to carelessness or inadvertence. So is the corresponding gain to the other party to the business transaction with the consumer in the course of which these acts or omissions occur. Where, in the way that business is now conducted, they are likely to be acts or omissions of employees of that party and subject to his orders, the most effective method of deterrence is to place on the employer the responsibility of doing everything which lies within his power to prevent his employees from doing anything which will result in the commission of an offence.

This, I apprehend, is the rational and moral justification for creating in the field of consumer protection, as also in the field of public health and safety, offences of 'strict liability' for which an employer or principal, in the course of whose business the offences were committed, is criminally liable, notwithstanding that they are due to acts or omissions of his servants or agents which were done without his knowledge or consent or even were contrary to his orders. But this rational and moral justification does not extend to penalising an employer or principal who has done everything

(1) (1933), 97 JP 105.

(2) [1967] 3 All ER 849; [1969] 1 QB 676.

that he can reasonably be expected to do by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to control or influence, to prevent the commission of the offence (see *Lim Chin Aik v R* (1); *Sweet v Parsley* (2)). ¶ What the employer or principal can reasonably be expected to do to prevent the commission of an offence will depend on the gravity of the injury which it is sought to prevent and the nature of the business in the course of which such offences are committed. The Trade Descriptions Act 1968 applies to all businesses engaged in the supply of goods and services. If considerations of cost and business practicability did not play a part in determining what employers carrying on such businesses could reasonably be expected to do to prevent the commission of an offence under the Act, the price to the public of the protection afforded to a minority of consumers might well be an increase in the cost of goods and services to consumers generally.

My Lords, I approach the question of construction of the Trade Descriptions Act 1968 in the expectation that Parliament intended it to give effect to a policy of consumer protection which does have a rational and moral justification. The offence with which the instant appeal is concerned is one created by s 11 (2) of the Act:

'If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.'

The section is dealing with offers to enter into contracts for the sale of goods. Prima facie, the offence is committed by the person who would be a party to the contract of sale resulting from acceptance of the offer notwithstanding that the actual offer was made and the prohibited indication given by a servant or agent acting within the scope of his actual or ostensible authority on his employer's or principal's behalf. So construed the subsection creates an offence of 'strict liability' on the part of the employer or principal. But this strict liability is expressed to be 'subject to the provisions of this Act'.

This construction is, in my view, confirmed by ss 23 and 24 of the Act. It is convenient to deal with these sections in reverse order and in their application to an employer or principal who is a natural person before considering the position of an employer or principal who is a corporation. Section 24 (1) provides:

'In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.'

The section speaks of 'the commission of the offence' notwithstanding that the person charged may have a defence to the charge under sub-s (1). This language refers to a stage in the proceedings at which the prosecution have proved facts necessary to constitute an offence of strict liability on the part of a principal. This is all that it is incumbent on the prosecution to prove. The onus then lies on the principal to prove facts which establish a defence under the subsection. The 'strict liability' of the principal is thus qualified; but the onus of proving that he was not to blame lies on him. It is reasonable that this should be so since the facts which can

(1) [1963] AC 160, 498.

(2) 133 JP 188; [1969] 1 All ER 347; [1970] AC 132.

constitute the defence lie within his knowledge and not within that of the prosecution.

There are two limbs to the defence. Under para (a) the person charged must prove that the commission of the offence was due to one of the causes specified in that paragraph. They have the common characteristic that the offence must have been committed without his knowledge or acquiescence. The particular cause which is relevant to the instant appeal is 'the act or default of another person'. But the person charged must also prove under para (b) that he did all that could reasonably be expected of him to prevent offences of that kind being committed by himself or by any person under his control—a class of persons which would include his servants or agents. Where the employer or principal is a natural person I can see no reason in linguistics or justice for construing the expression 'another person' in para (a) as excluding a servant or agent of the employer or principal, however exalted his grade, whose actual physical act or omission resulted in the commission of the offence. They all fall within the expression 'any person under his control' and his duty in respect of their acts and omissions is dealt with in para (b).

Where the cause of the commission of the offence by him which is relied on by the person charged is the act or default of another person, sub-s (2) requires him, as a condition of relying on the defence, to provide the prosecution, not less than seven days before the hearing, with such information as he possesses which may lead to the identification of that other person. This procedure is calculated to serve two purposes. One obvious purpose is to give to the prosecution in advance of the hearing an opportunity to investigate the validity of the defence. The clue to the other purpose, which is important to the deterrent policy of the Act, is to be found in s 23. It provides:

'Where the commission by any person of an offence under this Act is due to the act or default of some other person that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first-mentioned person.'

It is important to observe that this section makes guilty of the offence created by some other section of the Act, such as s 11 (2), persons, such as servants or agents, who do not fall within the description contained in that other section of the person by whom the offence can be committed. They can nevertheless be charged and convicted of that offence by virtue of s 23 if the commission of the offence by a person who does fall within the description contained in that other section, was due to any act or default by them.

In the expression 'act or default' in s 23 and in s 24 (1) (a) the word 'act' is wide enough to include any physical act of the other person which is causative of the offence. But the use of the word 'default' instead of the neutral expression 'omission' connotes a failure to act which constitutes a breach of a legal duty to act. A legal duty to act may arise independently of any contract or it may be a duty owed to another person arising out of a contract with him. That in s 24 (1) (a) the word 'default' embraces a failure to act which is in breach by a servant of his contract of employment, is, in my view, made apparent by s 24 (1) (b) which requires that a person who relies on this defence must show 'that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by . . . any person under his control'. This contemplates that the person charged has the power to control the acts or defaults of the other person. The only legal source of such power to control is contractual.

But even where the power to control is derived from a contract, the contract need not necessarily be made directly between the person who has the power to

control and the 'person under his control'. In the context of offences committed in the course of business transactions, a superior servant may owe a duty to his employer under his contract of employment to supervise the work of an inferior fellow servant in the same employment and to give him orders as to how he should do his work; while the inferior servant may owe a corresponding duty to the same employer under his own contract of employment to accept the supervision and to comply with the orders of the superior servant. A failure to supervise, or an omission to give orders to, an inferior servant, if it constitutes a breach by the superior servant of his contract of employment with his employer, may be a 'default of another person' on which the employer can rely as a defence under s 24 (1) (a).

So construed these sections provide for a rational and just system of enforcement of the penal provisions of the Act which is calculated to deter anyone engaged in the business of supplying goods or services, whether as principal or as a servant, from conduct, whether careless or intentional, which would result in the commission of an offence, and, where it fails to deter, to impose a criminal sanction on those who are really to blame and not on those who are innocent of any carelessness or wrongful intent.

The enforcing authority is the local weights and measures authority (s 26). The powers conferred on its authorised officers to make test purchases, etc (s 27) and to enter premises and inspect and seize goods and documents (s 28) are calculated to enable these officers to obtain evidence of the commission of an offence by the principal by whom or on whose behalf the business of supplying goods or services is carried on. It is then for the principal to identify the other person or persons (if any) to whose act or default the offence was actually due and to pass to the prosecutor the available identificatory information. If the principal is not able to do this, it shows a defect in the system which he has laid down for allocating among his servants the duty of taking precautions to avoid the commission of offences under the Act. There is no injustice in requiring him to lay down a reasonably effective system and in treating any failure to do so as a criminal offence. If, on the other hand, the principal is able to identify a person to whose act or default the offence was actually due, he still has to show that he himself exercised due diligence to devise an effective system to avoid such acts or defaults on the part of his servants and to satisfy himself that such system was being observed.

What amounts to the taking of all reasonable precautions and the exercise of all due diligence by a principal in order to satisfy the requirements of s 24 (1) (b) of the Act depends on all the circumstances of the business carried on by the principal. It is a question of fact for the justices in summary proceedings or for the jury in proceedings on indictment. However large the business, the principal cannot avoid a personal responsibility for laying down the system for avoiding the commission of offences by his servants. It is he alone who is party to their contracts of employment through which this can be done. But in a large business, such as that conducted by the appellants in the instant appeal, it may be quite impracticable for the principal personally to undertake the detailed supervision of the work of inferior servants. It may be reasonable for him to allocate these supervisory duties to some superior servant or hierarchy of supervisory grades of superior servants, under their respective contracts of employment with him. If the principal has taken all reasonable precautions in the selection and training of servants to perform supervisory duties and has laid down an effective system of supervision and used due diligence to see that it is observed, he is entitled to rely on a default by a superior servant in his supervisory duties as a defence under s 24 (1), as well as, or instead of, on an act or default of an inferior servant who has no supervisory duties under his contract of employment. Thus, the supervisory servant may have failed to give adequate instructions to the inferior servant or may have failed to take reasonable steps to

see that his instructions were obeyed. In the former case the supervisory servant may alone be to blame. In the latter both may be to blame. Or it may be, as might have been the case in the instant appeal, that the commission of the offence is due to a combination of separate acts or omissions by two more inferior servants none of which taken by itself would have resulted in the commission of an offence.

In the instant case there were findings of fact by the justices that the commission of the offence was due to the act or default of the appellants' servant Mr Clement in his duties as branch manager to supervise the work of the staff under him, and that the appellants had fulfilled the requirements of s 24 (1) (b). They had also fulfilled the requirements of s 24 (2) by serving a notice on the prosecutor identifying Mr Clement as the other person to whose act or default the commission of the offence was due. On these findings the appellants were, in my view, entitled to succeed in their defence under s 24. The justices, however, were of opinion that Mr Clement was not in law 'another person' within the meaning of s 24 (1) (a) and, accordingly, convicted the appellants.

The Divisional Court were of opinion that Mr Clement was 'another person' but achieved the same result by dismissing the appeal on the ground that under the Act a principal was personally responsible criminally for any failure by any of his servants or agents to exercise diligence in supervisory functions which he had required them to undertake. The Divisional Court in reaching this conclusion did not rely on the fact that the appellants are not a natural person but a corporation. But, before turning to the previous authorities which the Divisional Court felt bound to follow, it is convenient to deal with the legal consequences of the corporate character of the appellants, for this has been relied on by the respondent in your Lordships' House as an alternative ground for dismissing the appeal.

To establish a defence under s 24 a principal who is a corporation must show that it 'took all reasonable precautions and exercised all due diligence'. A corporation is an abstraction. It is incapable itself of doing any physical act or being in any state of mind. Yet in law it is a person capable of exercising legal rights and of being subject to legal liabilities which may involve ascribing to it not only physical acts which are in reality done by a natural person on its behalf but also the mental state in which that person did them. In civil law, apart from certain statutory duties, this presents no conceptual difficulties. Under the law of agency the physical acts and state of mind of the agent are in law ascribed to the principal, and if the agent is a natural person it matters not whether the principal is also a natural person or a mere legal abstraction. *Qui facit per alium facit per se: qui cogitat per alium cogitat per se*. But there are some civil liabilities imposed by statute which, exceptionally, exclude the concept of vicarious liability of a principal for the physical acts and state of mind of his agent; and the concept has no general application in the field of criminal law. To constitute a criminal offence, a physical act done by any person must generally be done by him in some reprehensible state of mind. Save in cases of strict liability where a criminal statute, exceptionally, makes the doing of an act a crime irrespective of the state of mind in which it is done, criminal law regards a person as responsible for his own crimes only. It does not recognise the liability of a principal for the criminal acts of his agent; because it does not ascribe to him his agent's state of mind. *Qui peccat per alium peccat per se* is not a maxim of criminal law.

Due diligence is in law the converse of negligence and negligence connotes a reprehensible state of mind—a lack of care for the consequences of his physical acts on the part of the person doing them. To establish a defence under s 24 (1) (b) of the Act, a principal need only show that he personally acted without negligence. Accordingly, where the principal who relies on this defence is a corporation a question to be



answered is: What natural person or persons are to be treated as being the corporation itself, and not merely its agents, for the purpose of taking precautions and exercising diligence?

My Lords, a corporation incorporated under the Companies Act 1948 owes its corporate personality and its powers to its constitution, the memorandum and articles of association. The obvious and the only place to look, to discover by what natural persons its powers are exercisable, is in its constitution. The articles of association, if they follow Table A, provide that the business of the company shall be managed by the directors and that they may 'exercise all such powers of the company' as are not required by the Act to be exercised in general meeting. Table A also vests in the directors the right to entrust and confer on a managing director any of the powers of the company which are exercisable by them. So it may also be necessary to ascertain whether the directors have taken any action under this provision or any other similar provision providing for the co-ordinate exercise of the powers of the company by executive directors or by committees of directors and other persons, such as are frequently included in the articles of association of companies in which the regulations contained in Table A are modified or excluded in whole or in part.

In my view, therefore, the question: What natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company. This test is in conformity with the classic statement of VISCOUNT HALDANE LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1). The relevant statute in that case, although not a criminal statute, was in *pari materia*, for it provided for a defence to a civil liability which excluded the concept, the vicarious liability, of a principal for the physical acts and state of mind of his agent.

There has been in recent years a tendency to extract from DENNING LJ's judgment in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* (2) his vivid metaphor about the 'brains and nerve centre' of a company as contrasted with its hands, and to treat this dichotomy, and not the articles of association, as laying down the test of whether or not a particular person is to be regarded in law as being the company itself when performing duties which a statute imposes on the company. In the case in which this metaphor was first used DENNING LJ was dealing with acts and intentions of directors of the company in whom the powers of the company were vested under its articles of association. The decision in that case is not authority for extending the class of persons whose acts are to be regarded in law as the personal acts of the company itself, beyond those who by, or by action taken under, its articles of association are entitled to exercise the powers of the company. Insofar as there are dicta to the contrary in *The Lady Gwendolen* (3) they were not necessary to the decision and, in my view, they were wrong.

But the only relevance of this to the appellants' defence under s 24 (1) of the Trade Descriptions Act 1968, was, as the justices rightly appreciated, whether the act or default of Mr Clement was that of 'another person' than the appellants themselves within the meaning of s 24 (1) (a). The fact that the principal in the business transaction in the course of which an offence under s 11 (2) was committed was a corporation and not a natural person cannot affect the principal's duty to take all reasonable

(1) [1915] AC 705; [1914-15] All ER Rep 280.

(2) [1956] 3 All ER 624; [1957] 1 QB 159.

(3) [1965] 2 All ER 283; [1965] P 294.



precautions and to exercise all due diligence under s 24 (1) (b). The articles of association of the appellants were not produced in evidence. Strictly speaking it may be that they should have been. But it is sufficiently evident from the findings of the justices as to the position held by Mr Clement in the appellants' organisation that it was too lowly for him to have had confided in him by the board of directors the co-ordinate exercise of any of the powers of the company itself.

My Lords, there may be criminal statutes which on their true construction ascribe to a corporation criminal responsibility for the acts of servants and agents who would be excluded by the test that I have stated to be appropriate in determining whether a corporation has itself committed a criminal offence. The Trade Descriptions Act 1968, however, so far from containing anything which compels one to reject that test, recognises, by s 20, the distinction between 'any director, manager, secretary or other similar officer of a body corporate' and other persons who are merely its servants or agents. Section 20 (1) provides as follows:

'Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.'

The natural persons described in this subsection correspond with those who under the memorandum and articles of association of a company exercise the powers of the company itself. From this it follows that if any of them is guilty of neglect in the exercise of those powers such neglect is that of the company itself. That it cannot be relied on as 'the act or default of another person', so as to entitle the company to a defence under s 24 (1), is implicit in the provision in s 20 (1) that a person in the described category shall be guilty of an offence 'as well as the body corporate'. Without s 20 it would have been open to doubt whether persons whose acts were in law the acts of the company itself would have been guilty in their personal capacity also of the offence committed by the company.

For these reasons I agree with the Divisional Court that Mr Clement was 'another person' within the meaning of s 24 (1) (a). So all that now remains is to deal with the authorities which that court followed in holding that the appellant's defence nevertheless failed. Those authorities start with the contrasting cases of *R C Hammett Ltd v Crabb*, *R C Hammett Ltd v Beldam* (1) and *R C Hammett Ltd v London County Council* (2). Both were prosecutions under the Sale of Goods (Weights and Measures) Act 1926. The relevant provisions of that Act exempted the employer from any penalty, though not from conviction, if he proved that he had used 'due diligence to enforce the execution of this Act'. But his right to exemption was conditional on his laying an information against the person whom he charged as 'the actual offender' and proving that that person had committed the offence in question. In *R C Hammett Ltd v Crabb* the employer charged as the actual offender his servant who had done the physical act which constituted the offence and that servant had been duly convicted. The Divisional Court held that the employer was entitled to rely on his having used due diligence. In *R C Hammett Ltd v London County Council* the employer again charged as 'the actual offender' his servant who had done the physical act which constituted the offence. But the servant charged was acquitted by the magistrates—which would seem to dispose of any claim by the employer to be exempt from

(1) (1931), 95 JP 180.

(2) (1933), 97 JP 105.

the penalty, as the Divisional Court had itself previously decided in *Walking Ltd v Robinson* (1). The employer, nevertheless, appealed to quarter sessions. Quarter sessions found as a fact that a servant of the employer who was manager of the shop had not used due diligence in supervising the servant who had been charged (and acquitted) as the actual offender, though in all other respects the employer had exercised due diligence. The Case stated by quarter sessions for the opinion of the Divisional Court appears to have been treated as raising the question of law whether, in order to avail himself of the exemption from penalty, the employer had to prove that due diligence had been used not only by himself but also by all of his servants who exercised supervisory functions 'down to the very person who had committed the act'. The Divisional Court apparently thought that the employer had to do so and that this distinguished the case from *R C Hammett Ltd v Crabb*. But the language of the judgment is far from clear and affords no clue to the reasons which lead the court to this conclusion.

This obscure and unsatisfactory judgment appears to have now passed into legal folk lore as authority for a general proposition that where a statute creates a criminal offence in relation to a business transaction which is prima facie one of strict liability on the part of the principal who is the party to the business transaction in the course of which the offence is committed, but provides the principal with a defence if he proves that he has exercised due diligence, he cannot avail himself that defence unless he proves that due diligence was also exercised by all of his servants whom he employed in any supervisory capacity however humble. See *Beckett v Kingston Bros (Butchers) Ltd* (2), a case under the Trade Descriptions Act 1968.

The proposition assumed to have been established in *R C Hammett Ltd v London County Council* has not been followed consistently. In *Melias Ltd v Preston* (3), which was also a case under the Sale of Food (Weights and Measures) Act 1926, there were three separate summonses against the employer, in respect of each of which he charged the manager of one of his shops as the actual offender. In two of the summonses the manager had himself done the physical act which constituted the offence (as in *R C Hammett Ltd v Crabb*). In the third his default was his failure in supervising an inferior servant who had done the physical act which constituted the offence (as in *R C Hammett Ltd v London County Council*). The Divisional Court drew no distinction between the three offences and upheld in each of them the employer's defence 'that he had used due diligence' to enforce the execution of the Act.

*Series v Poole* (4), the case principally relied on by the Divisional Court in the instant appeal, was a case under the Road Traffic Acts 1960 and 1962 which contained provisions in relation to the offence by a holder of a carrier's licence in failing to cause records to be kept by his drivers which are in pari materia to those of the Trade Descriptions Act 1968. It is a defence to him to prove 'that he used all due diligence to secure compliance with those provisions'. The holder of the carrier's licence who was a natural person, not a corporation, had instructed his secretary to supervise the keeping of the records by the drivers. The magistrates found that he himself had exercised all due diligence, but that his secretary had not. Although *R C Hammett Ltd v London County Council* (5) was cited in argument in the Divisional Court, LORD PARKER CJ preferred to decide the case as 'purely one of principle'. That principle he stated as being: 'if Parliament has put an absolute duty on some individual, he cannot evade that duty by delegating it to somebody else.' So far

(1) 94 JP 73; [1929] All ER Rep 658.

(2) 134 JP 270; [1970] 1 All ER 715; [1970] 1 QB 606.

(3) 121 JP 444; [1957] 2 All ER 449; [1957] 2 QB 380.

(4) [1967] 3 All ER 849; [1969] 1 QB 676.

(5) (1933), 97 JP 105.

the principle is unexceptional. Any legal duty, whether arising at common law or imposed by statute, may generally be performed by the person on whom it is imposed through the agency of some other person. But if it is not performed, the person on whom the duty is imposed is liable for its non-performance. It is irrelevant that he instructed a servant or agent to perform it on his behalf, if that servant or agent failed to do so. All that is relevant is that the duty was not performed. When the duty is imposed on a person by statute and non-performance is made a criminal offence without any requirement of *mens rea* this is what is meant by an offence of 'strict liability'.

The fallacy lies in the next step of argument. Where Parliament in creating an offence of 'strict liability' has also provided that it shall be a defence if the person on whom the duty is imposed proves that he exercised all due diligence to avoid a breach of the duty, the clear intention of Parliament is to mitigate the injustice which may be involved in an offence of strict liability, of subjecting to punishment a careful and conscientious person who is in no way morally to blame. To exercise due diligence to prevent something being done is to take all reasonable steps to prevent it. It may be a reasonable step for an employer to instruct a superior servant to supervise the activities of inferior servants whose physical acts may in the absence of supervision result in that being done which it is sought to prevent. This is not to delegate the employer's duty to exercise all due diligence; it is to perform it. To treat the duty of an employer to exercise due diligence as unperformed unless due diligence was also exercised by all his servants to whom he had reasonably given all proper instructions and on whom he could reasonably rely to carry them out, would be to render the defence of due diligence nugatory and so thwart the clear intention of Parliament in providing it. For, *pace R C Hammett Ltd v London County Council* (1), there is no logical distinction to be drawn between diligence in supervising and diligence in acting, if the defaults of servants are to be treated in law as the defaults of their employer.

My Lords, the Divisional Court was, I think, right in treating the instant case as governed by the decision in *Series v Poole* (2). But that case was, in my view, wrongly decided and the proposition of law for which *R C Hammett Ltd v London County Council* has been treated as an authority is also erroneous, although the actual decision in that case to dismiss the appeal could have been justified on quite different grounds. I would allow this appeal.

*Appeal allowed.*

Solicitors: *Alsop, Stevens, Bateson & Co; Gregory, Rowcliffe & Co.*

G.F.L.B.

(1) (1933), 97 JP 105.

(2) [1967] 3 All ER 849; [1969] 1 QB 676.

**COURT OF APPEAL (CIVIL DIVISION)**

(LORD DENNING, MR, SACHS AND BUCKLEY, LJJ)

21st, 22nd January, 15th February 1971

BUCKOKE AND OTHERS v GREATER LONDON COUNCIL

*Road Traffic—Light signals—Fire brigade vehicles—Passing red lights—Order regulating—Validity.*

By an order issued on February 3, 1967, the chief officer of the London Fire Brigade stated: 'Drivers of fire brigade vehicles are under the same obligation at law to obey traffic light signals as the drivers of other vehicles. If, however, a brigade driver responding to an emergency call decides to proceed against the red light, he is (unless signalled to proceed by a police constable in uniform) to stop his appliance, car, or other vehicle at the red light, observe carefully the traffic conditions around him, and to proceed only when he is reasonably sure that there is no risk of a collision . . . Extreme caution is to be used and the driver is not to cross until it is clear that the drivers of other vehicles appear aware that he is proceeding . . .'

HELD: on its true construction the order was not unlawful as being an encouragement to drivers to break the law; speed in getting to the scene of a fire was crucial, and risk to life and property was increased by any delay; and the order was a justifiable administrative step taken by the chief officer in the public interest.

Per LORD DENNING, M.R.: Like principles apply to ambulance men and police officers. The law, if taken by the letter of it, says that they are not to shoot the lights when they are red. But the public interest may demand that, when all is clear, they should follow the precedent followed by Lord Nelson . . . In supporting what the chief officer has done . . . we have grafted an exception on to the strictness of the law so as to mitigate the rigour of it.

APPEAL by the plaintiffs, William Walter Buckoke and 19 other members of the London Fire Brigade, from a decision of PLOWMAN J, reported 134 JP 465 dismissing their action against the defendants, the Greater London Council, for a declaration that London Fire Brigade order 144/8 was unlawful, and for injunctions requiring the defendants to withdraw and countermand the order, restraining the defendants by themselves, their servants or agents from implementing the order, and restraining the defendants by themselves their servants or agents from continuing with disciplinary proceedings under the Fire Services (Discipline) Regulations, 1948.

*Peter Pain QC and P B Creightmore for the plaintiffs.*

*R I Kidwell QC and G M Hamilton for the defendants.*

*Cur adv vult*

15th February. The following judgments were read.

**LORD DENNING MR:** For many years there has been a controversy in the fire service. It is this: What is the duty of the driver of a fire engine when he comes to traffic lights which are at red? The Fire Brigades Union say that he must obey the law. No matter how urgent the call, he must wait till the lights turn green. Even if it means losing precious seconds, he must wait all the same. The chief officer of the London Fire Brigade says No; he is not going to order the driver to wait. If the road is clear and the driver stops for a second and makes sure that it is safe to cross, he can shoot the lights so as to get to the fire as soon as possible. But, if he thinks it better to wait until the lights go green, he is at perfect liberty to do so. The decision is his, and his alone. The controversy has been considered by the Central Fire Brigade Advisory Council. It has been before the Home Secretary and the Secretary of State for Scotland. They have declined to interfere either by

legislation, or otherwise. So the rival views have been brought before us to decide between them.

In accordance with his view, the chief officer of the London Fire Brigade, with the support of the Greater London Council, has issued an instruction. Its formal description is brigade order 144/8, dated 3rd February 1967. It states:

'Traffic light signals—Drivers of fire brigade vehicles are under the same obligation at law to obey traffic light signals as the drivers of other vehicles. If, however, a brigade driver responding to an emergency call decides to proceed against the red light, he is (unless signalled to proceed by a police constable in uniform) to stop his appliance, car, or other vehicle at the red light, observe carefully the traffic conditions around him, and to proceed only when he is reasonably sure that there is no risk of a collision; the bell is to be rung vigorously and/or the two-tone horn sounded and the blue flashing light(s) operated. Extreme caution is to be used and the driver is not to cross until it is clear that the drivers of other vehicles appear aware that he is proceeding. The onus of avoiding an accident in such circumstances rests entirely on the brigade driver, who is to remember that a collision might well prevent his vehicle from reaching its destination and might also block the road for other essential services; no call is so urgent as to justify this risk.'

The Fire Brigades Union take exception to that order. They say that it is unlawful because it is an encouragement to the drivers to break the law. They determined to test the legal position. They told some 20 of their members, the plaintiffs, to refuse to travel with a driver unless he gave them an assurance that he would observe the law and would never cross the lights when they were at red. The drivers refused to give that assurance. Whereupon the plaintiffs refused to travel with the drivers. The chief officer took disciplinary proceedings against the plaintiffs. They were charged under the Fire Services (Discipline) Regulations 1948 with:

'Disobedience to orders, that is to say, if he disobeys, or without sufficient cause fails to carry out, any lawful order, whether in writing or not.'

The plaintiffs thereupon brought this action against the Greater London Council, the defendants. They claimed a declaration that order 144/8 of 3rd February 1967 was an unlawful one, and an injunction restraining the defendants from continuing with the disciplinary proceedings.

The issue in the action depends, I think, on this: Was the order of the chief fire officer 144/8 lawful or unlawful? If it was lawful, the plaintiffs had no possible justification for refusing to travel with the driver. If it was unlawful, they could justifiably say that they had sufficient cause for their refusal because they were not bound to travel with a driver who was under unlawful orders.

#### *The statutory provisions*

There is no doubt that, on a strict reading of the statutes, a fireman is bound to obey the traffic lights just as much as anyone else. If he does not do so, he may be prosecuted to conviction; his licence may be endorsed; and, if it is endorsed three times he may be disqualified from driving; and thus lose his job—and the fire service would lose a man.

The statutory provisions are as follows. By s 14 of the Road Traffic Act 1960, as amended by the Road Traffic Act 1962:

'where a traffic sign . . . has been lawfully placed on or near a road, a person driving or propelling a vehicle who . . . (b) fails to comply with the indication given by the sign, shall be liable on summary conviction to a fine not exceeding fifty pounds.'

By the Traffic Signs Regulations and General Direction 1964, regs 7 and 34:

'7. Section 14 of the Road Traffic Act 1960 shall apply . . . to the red signal when shown by the light signals . . .

'34. (1) . . . (a) the red signal shall convey the prohibition that vehicular traffic shall not proceed beyond the stop line . . .

as to which see *Ryan v Smith* (1). By s 7 (1) of the Road Traffic Act 1962, when a person is convicted of disobeying a traffic light signal:

'the court shall order that particulars of the conviction, and, if the court orders him to be disqualified, particulars of the disqualification, shall be endorsed on any licence held by him . . .

By s 7 (2):

'If the court does not order the said person to be disqualified, the court need not order particulars of the conviction to be endorsed as aforesaid if for special reasons it thinks fit not to do so.'

By s 5 (3) of the 1962 Act, where a person has already two previous convictions which have been endorsed:

'the court shall order him to be disqualified for . . . not less than six months . . . unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction . . .

Those provisions, taken in all their strictness, apply to fire engines, ambulances and police cars, as much as to anyone else. None of them is exempt from obeying the red lights. But by special permission they are exempt from obeying the speed limit: see s 79 of the Road Traffic Regulations Act 1967.

#### *The defence of necessity*

During the argument I raised the question: Might not the driver of a fire engine be able to raise the defence of necessity? I put this illustration. A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds, or more, for the lights to turn green? If the driver waits for that time, the man's life will be lost. I suggested to both counsel that the driver might be excused in crossing the lights to save the man. He might have the defence of necessity. Both counsel denied it. They would not allow him any defence in law. The circumstances went to mitigation, they said, and did not take away his guilt. If counsel are correct—and I accept that they are—nevertheless such a man should not be prosecuted. He should be congratulated.

#### *Mitigating the rigour of the law*

Accepting that the law, according to the strict letter of it, does compel every driver to stop at the red light, no matter how great the emergency, even when there is no danger, then the question arises: Can the chief officer of the fire brigade issue an order authorising his men to depart from the letter of the law?

This raises an important question. It is a fundamental principle of our constitution, enshrined in the Bill of Rights (1688), that no one, not even the Crown itself, has the 'power of dispensing with laws or the execution of laws'. But this is subject to some qualification. When a law has become a dead letter, the police need not prosecute.



Nor need the justices punish. They can give an absolute discharge. So also when there is a technical breach of the law in which it would be unjust to inflict any punishment whatever. The commissioner of police may properly in such a case make a policy decision directing his men not to proceed: see *R v Metropolitan Police, ex parte Blackburn* (1) where it was said that a chief officer of police can 'make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide'. So in this case, I have no doubt that the commissioner of police could give directions to his men—he may indeed have done so, for aught I know—that they need not prosecute when the driver of a fire engine crosses the lights, so long as he uses all care and there is no danger to others. This would be a justifiable policy decision so as to mitigate the strict rigour of the law. If any police officer, notwithstanding this direction, should prosecute for this technical offence, I would expect the justices to give the driver an absolute discharge under s 7 of the Criminal Justice Act 1948. Thus by administrative action, backed by judicial decision, an exemption is grafted on to the law.

We were told that in practice the police do not prosecute the driver of a fire engine for crossing the lights at red except when there has been an accident and they think that he has not taken proper care. They then prosecute him both for crossing the lights at red and also for careless driving. The driver has no defence to crossing the lights and pleads guilty to that charge. He disputes the careless driving, and may or may not be found guilty of it. I would hope that, if he is acquitted of careless driving, he would be given an absolute discharge on the charge of crossing the lights.

I take it, therefore, that the commissioner of police can give a policy direction to his men saying that they need not prosecute a fireman for crossing the lights at red when there is no danger. If the commissioner of police can do this, I see no reason why the chief officer of the fire brigade should not do likewise. He can say to his men: 'So long as you stop and see that all is clear before crossing the lights, no disciplinary action will be taken against you.' That is a justifiable administrative step taken by him in the public interest. We should, I think, back it by our judicial decision today. I hold, therefore, that order 144/8 of 3rd February 1967 was a perfectly lawful order.

#### *The disciplinary proceedings*

Seeing that order 144/8 was a lawful order, I think that the disciplinary proceedings must go on.

Suppose that a driver were to say to a crewman: 'I am going to break the law and crash the red lights, even when it is dangerous to do so,' I think that the crewman could justifiably refuse to travel with that driver. He would not be bound to submit himself to danger in that way: see *Ottoman Bank v Chakarian* (2). But it is altogether different when the driver says: 'I am not going to crash the lights except when there is no risk of a collision, and then only after taking the precautions laid down in brigade order 144/8'. If the officer orders the crewman to travel with such a driver, it is a lawful order, and the crewman has no sufficient cause for failing to carry it out.

PLOWMAN J devoted a considerable part of his judgment to *Ex parte Fry* (3), but that case was not canvassed before us. It does not warrant the proposition that the rules of natural justice do not apply to disciplinary bodies. They must act fairly just the same as anyone else, and are just as subject to control by the courts. If the firemen's disciplinary tribunal were to hold an order to be a lawful order when it was not, I am sure that the courts could interfere; or, if it proceeded contrary to the rules of natural justice in a matter of serious import, so also the courts could interfere. But,

(1) [1968] 1 All E.R. 763; [1968] 2 QB 118.

(2) [1930] AC 277.

(3) 118 JP 313; [1954] 2 All ER 118.

as in this case, the order was lawful and the tribunal will, I have no doubt, do what is just, there is no ground whatever for interfering.

#### Conclusion

We have considered here the firemen. Like principles apply to ambulance men and police officers. The law, if taken by the letter of it, says that they are not to shoot the lights when they are at red. But the public interest may demand that, when all is clear, they should follow the precedent set by Lord Nelson. If they should do so, no man should condemn them. Their chief officer says that he will not punish them. Nor should the justices. Now that we in this court support what the chief officer has done, it means that, in point of practice, we have grafted an exception on to the strictness of the law so as to mitigate the rigour of it. It may now truly be said that firemen, ambulance men and police officers are to be excused if they shoot the lights when there is no risk of a collision and the urgency of the case so demands. The courts of the United States have done somewhat similar, but on rather special grounds: *Lilly v State of West Virginia* (1). We do it on practical grounds, but they are none the worse for that.

Should the law be amended so that there is not even a technical breach? I think that it should. By making it an offence without exceptions, Parliament has opened the way to endless discussion in fire stations which should be brought to a close. I hope that our judgment today will do something to end them. But Parliament can do it better. I would dismiss this appeal.

**SACHS LJ:** To anyone conversant with the proud record and magnificent traditions of the London Fire Brigade, as moulded by the renowned Chief Officer Shaw on its foundation at the end of the last century, it is sad and indeed rather startling that even a minute fraction of the 4,700 men now in the brigade should be adopting the extreme attitude taken up by the plaintiffs on a matter where the snatching of a fellow human's life from a terrifying death may easily turn on a quarter of a minute—"a matter of seconds" as Chief Officer Leete has deposed.

It is not only of general interest, but, indeed, directly relevant to any discretion to be exercised by this court when considering whether to make the orders sought by the plaintiffs, to relate the sequence of events that has led up to the present position. In the days of Captain Massey Shaw there were, of course, no traffic lights and none of those traffic signs of which nowadays there is such a proliferation. After the First World War there came into being traffic lights (first introduced about 1929) and traffic signs evoked by increasing motorised traffic and by lack of police manpower to control it in the old way. The natural result was that those concerned with saving life and valuable property by means for which the speediest possible arrival on the scene was absolutely imperative felt that the call of humanity demanded the exercise of discretion whether or not to obey the strict letter of the law. That in turn led to there coming into existence one of those compromise situations which are so typical of this country and the despair of those who regard law and logic as being one and the same thing. The police normally exercise their discretion so as only to prosecute in rare cases; if the prosecution is successful the justices, unless there has been some real disregard of the safety of others, either give an absolute discharge or impose a small fine, and then in accordance with a direction given in a Home Office circular of 18th August 1949 (Fire Service Circular 27/1949), which remains in force to this day, all fire authorities in England and Wales in appropriate cases refund to the fireman driver any fine he has to pay and any costs which he has incurred; this expenditure falls, we were given to understand, on the local authority, but one half is refunded by

(1) (1928), 29 Federal Reporter (2nd Series) 61.

government grants. If a question of endorsement or disqualification arises then the justices are entitled to, and rightly do, regard the fact that the vehicle was being driven 'on the bell', i.e. answering an emergency call to a fire, as a special reason for not ordering disqualification (cf *R v Lundt-Smith* (1))—and I find it hard to accept that there has ever been an endorsement ordered by a London magistrate for what was in essence no more than a technical offence when answering an emergency call.

Over the years from 1933 to date there have been promulgated a succession of fire brigade orders which recognised that the force of the calls of humanity would lead drivers of fire engines when in eager pursuit of their aim to reach the scene of the fire to disregard adverse traffic lights when there was no risk to others in so doing, and these orders sought to ensure that no such risks should be taken. Each of those orders calls attention to the fact that drivers of fire engines are subject to the same obligations to obey traffic lights as drivers of other vehicles. None of them contains any order or request to disobey those signals. Each of them enjoins the drivers not to take risks—and is in a form that results in the taking of such a risk constituting a disciplinary offence. Orders in parallel terms have also from time to time been issued to ambulance drivers; the latest of these as issued on behalf of the defendants on the authority of its appropriate committee is dated 4th October 1968—and is plainly modelled on the fire brigade order now under consideration.

Against the background of such orders, and with the aid of a common sense attitude of the police, this compromise situation, illogical and indeed odd though it may on analysis appear, worked smoothly enough for some 35 years with the active support of the Home Office, the LCC, and the Central Fire Brigade Advisory Council (to whom I will refer as 'the Central Council') constituted under s 29 of the Fire Services Act 1947. Nor is there any evidence of discontent among the serving officers and men of the brigade before 1967—indeed counsel for the plaintiffs when questioned on this point did not suggest that there had been.

How then has it come about that these proceedings have been taken by the plaintiffs because of the initiation of disciplinary proceedings against them not as drivers but as crewmen? First, it is as well to make it clear that there is no evidence of any member of any crew having at any time during those 35 years suffered any material personal injury as a result of a driver failing to obey the traffic lights; nor can it be said to be likely that there is any reasonable probability of such injury occurring from the driving of fire engines in conformity with the provisions of the order now under discussion. It is true that there can be found in the papers before the court some reference to potential risks to the crew, but clearly this is not the matter which caused the issues in the present case to be raised—nor was it so suggested by counsel for the plaintiffs. Indeed it would be somewhat odd if men prepared gallantly to take the heavy risks that can be entailed in fighting fires and in the rescue of those endangered by them were to say that they were genuinely affected by the possibility of such unlikely risks as could be entailed by accompanying a driver who took the precautions set out in the order.

It emerges however from the affidavit of Mr Parry (who is no longer himself a member of the brigade) and was confirmed by counsel for the plaintiffs to this court that there are two things which have affected the minds of drivers. First, there seems to be an impression that there has been an increase lately in the frequency of police prosecution for traffic lights offences. Secondly, there appears to be a fear that the effect of the 'totting up' provisions of s 5 (3) of the Road Traffic Act 1962 could result in some driver or drivers being disqualified when it would be unfair for this to happen. An ill-judged penalty can produce unhappy consequences.

As regards the first of those matters, counsel for the defendants quoted to the court

(1) 128 JP 534; [1964] 3 All ER 225; [1964] 2 QB 167.

the following figures as to the number of convictions of fire appliance drivers for traffic lights offences over the past six years:

1965	..	3
1966	..	5
1967	..	4
1968	..	6
1969	..	6
1970	..	2

and called attention to the fact that in each year the number of appliance journeys 'on the bell' is about 150,000—involving many hundreds of thousands of driving miles. So there seems but little substance in the first of the two suggestions. As regards the second, it has perhaps not unnaturally escaped the attention of those canvassing these matters within their stations that s 5 (3) gives to the courts a considerably wider discretion as regards disqualification than they possess under those sections which impose a duty to disqualify save for 'special reasons'. It would appear that in practice it would be more than unlikely that a justice who was informed that a mere traffic lights offence had occurred when answering an emergency call would take it into account in a totting up case—clearly he should not do so, and would be reversed on appeal if he did.

Although, accordingly, the principal grounds which have led to concern on the part of some members of the brigade do not appear well founded, there is but little wonder that the situation created by fears of the operation of s 5 (3) of the 1962 Act, coupled with the escalating number of potential traffic offences that can occur, created a sea lawyer's paradise within the canteens of the stations of the brigade. Fuel was no doubt added to the debate by a distressing accident on what might be described as a 'million to one against' occurrence. Unfortunately there was this accident, which involved the death of a deaf motor cyclist who had not seen the flashing lights which are so clear a warning of the approach of a vehicle on emergency duty—and, to add to the sadness, the particular call being answered by the brigade was a hoax.

Thus in due course there seems to have resulted the present situation in which one man in 200 within the brigade wishes to refuse to answer an emergency fire call on any engine the driver of which has refused to undertake never to exercise a discretion when at traffic lights; in other words, they will not crew an appliance unless the driver has announced his determination in all circumstances to wait the full period at a red light on the way to a fire, even when to go against it could not result in the slightest danger to any other vehicle or person and although it is obvious that such waits could aggregate several minutes. That in turn led to disciplinary action being taken against the plaintiffs when they on that ground refused to obey orders to answer emergency calls as crewmen, and this action followed.

Before turning to the precise issues raised in this case there are certain further general facts that require to be mentioned. First, it is common knowledge that in London the number of traffic lights on main arteries may be numerous. There are, for instance, 17 in Oxford Street—averaging one every 125 yards. Moreover, some individual lights remain red for more than a full minute—at any rate up to  $1\frac{1}{4}$  minutes. At night, when there may be no other traffic in sight, if an engine waits the full period each time, adverse lights can produce delays of several minutes for appliances driven 'on the bell'.

Next it is to be observed that order 144/8 is a paragraph replacing para 1 in Brigade Order 144 which is entitled 'Motor Driving and Traffic Regulations', and was issued in June 1965. This order now contains some 23 paragraphs dealing with questions that can arise when drivers of fire engines are answering an emergency call. Paragraph 1 commences:

'Drivers of fire brigade vehicles are at all times subject to the law and to the general traffic rules, including the provisions of the Highway Code, in the same way as every other road user except as provided in sub-paragraphs (a) to (e) below.'

Those sub-paragraphs concern regulations as to speed limits, bells, flashing lights and waiting restrictions, which are the subject of special exceptions applying to fire brigade vehicles. Later paragraphs of the order refer to cases where there are no such special provisions. Thus 144/4 deals with refuges, 144/5 with roundabout systems, and 144/6 with going against the flow of the traffic in one-way streets. In each of those three cases the driver is constantly faced with the same question as when he comes to traffic lights—whether or not to conform rigidly to regulations made under the Road Traffic Regulations Act 1967 (a consolidating statute).

In principle there is in law no distinction between going on the wrong side of a bollard bearing the now familiar blue sign with a white arrow or going against the flow of traffic in a one-way street, on the one hand, and failing to comply with a red traffic signal on the other. Nonetheless there is no suggestion in the documents before the court, which include the proceedings of the Fire Brigades Union Annual Conference of 1968, of any objection by members of the brigade to driving on the wrong side of bollards or to proceeding contrary to a one-way traffic sign when in common sense an emergency so requires. It is, of course, manifest and was so conceded on behalf of the plaintiffs that strict compliance with all the provisions of traffic regulations would disastrously affect the work of the brigade and result in a lamentable increase in the risk of injury, death, and destruction of property. Paragraph 5 of the affidavit of the chief officer of the London Salvage Corps contains this passage:

'Any delay in the arrival of the Fire Brigade at the scene of a fire may jeopardize the rescue of persons in the building, increase the risk of death or injury to fire fighting members of the Fire Brigade, or make the containment of the fire more difficult or impossible. Fires spread extremely quickly and even a very slight delay may result in unnecessary loss of life. I have myself known cases in which only a very slight delay would have increased the loss of life.'

That obviously accurate statement has, of course, not been challenged.

Next to be noted is the attitude of the union to the issues under discussion as shown in documents which they have exhibited to the court. At p 56 of the 1968 Annual Report of the union's executive council it is stated that on behalf of the union, the general secretary, at a meeting of the central council, made it clear that 'the Union would firmly oppose any amendment of the law to allow any driver's exemption from obeying traffic signs'. That point was picked up by the president of the union when speaking at the annual conference of that year. There he emphasised the opposition of the union to amendment of the law—an opposition that had been pressed to the extent of the union members withdrawing from a specially appointed committee of the statutory Central Council (which has on it, among others, representatives of the Home Office Fire Service Department, county councils association, local fire authorities, National Association of Fire Officers and the union) when it appeared that all the other members of that committee were unanimously favouring an amendment of the law. Yet later he urges the policy that has led to the initiation of this action which is supported by the union—a policy of complete and unqualified compliance with traffic lights. This attitude of combining insistence on unswerving compliance with the strict letter of the existing law with complete opposition to any amendment of that law calls for an increase of precisely those perils to life and property to which reference has been made. It is thus gravely inimical to the public interest, it is wholly repugnant to the fine traditions of the

London Fire Brigade, and it could undermine and disrupt a hitherto splendid service. It is at best incomprehensible. It was not supported by counsel for the plaintiffs, but it forms part of the background against which the plaintiffs' claim for relief falls to be considered.

Next to be mentioned is that strongly pressed requests have been made to the Home Office by the chief officer, with the support of the defendants and the central council, that the law should be amended so as to provide exemption in suitable cases from the existing regulations for drivers of fire engines relating to traffic lights and signs. Those requests have been refused—a matter to which I will return. Accordingly order 144/8 has remained in force, again with the support of the defendants and the central council, and also with the support of the Home Office as is shown by continuance in force of Fire Service circular 27/1949 (which was brought up to date in 1967).

With that necessarily somewhat full examination of the circumstances leading to these proceedings I now turn to the claims made by the plaintiffs. First (despite being placed fourth on the writ) should come that which relates to the disciplinary proceedings, the commencement of which immediately preceded the issue of the writ. An injunction is claimed to restrain the defendants from continuing them. That claim must plainly fail for a number of reasons.

The orders given to them to perform their normal duties and attend fires were manifestly lawful. They were neither asked to commit any unlawful act, nor to be accessory to one. They would not be put in peril because a driver conformed with order 144/8; indeed conformity with it reduces even such risks as crewmen might allege that they incurred before it was issued. There is moreover no suggestion that the brigade's attitude to traffic lights was unknown to them at the time when they joined the service.

The attempt to raise the issue of legality of the order through this claim for an injunction is artificial. They are being disciplined as crewmen and not as drivers. No driver has come to complain to this court of the effect on him of order 144/8 when ordered to attend a fire—because no driver is enjoined by the order to disregard the law; on the contrary the chief officer has refused to allow station officers travelling on appliances to give any such order. The plain fact that no driver could reasonably—or indeed properly—complain to this court exemplifies the artificiality of the plaintiffs' claim. Crewmen simply have no such interest in the order as entitles them to make its existence a ground for claiming the injunction. Moreover even if, contrary to these views of mine, it had been arguable that the order to attend the fire was in some way tainted because of the existence of order 144/8, the court ought to my mind to refuse the remedy sought. When disciplinary proceedings in a service are concerned, the courts will not normally intervene before they are heard; and certainly not when there exists an admirable code of procedure such as is laid down by the Fire Services (Discipline) Regulations 1948, which provides not only for a carefully regulated hearing but also for one appeal in all cases and for two where a serious penalty is imposed (compare the observations of SINGLETON LJ at the conclusion of his judgment in *Ex parte Fry* (1)). On such facts as have so far been put before the court the initiation of disciplinary proceedings for deliberate disobedience within a public service of an obviously reasonable order was fully warranted—and indeed failure to take them would in due course have imperilled the efficiency of the service. Whether all the material facts are before this court is, of course, not known, and nothing that I have said is to be taken to bear on the result of the proceedings.

(1) 118 JP 313; [1954] 2 All ER 118.



Next for consideration are the claims for a declaration that order 144/8 is an unlawful order and for an injunction requiring the defendants to countermand it. When dealing with the claim to restrain the disciplinary proceedings I have referred to the artificiality of raising the legality of the order in that way, to the lack of any material interest of crewmen in the legality of the order—and also to the fact that drivers could not properly complain of it to this court. Those same matters preclude the plaintiffs from successfully seeking the declaration they claim. The facts of the present case are quite different from those in *Pharmaceutical Society of Great Britain v Dickson* (1) and in *Hughes v Architects' Registration Council of the United Kingdom* (2), where the interests of the plaintiffs were directly imperilled by the rules of the subject of complaint. The courts have always steadfastly declined to deal with questions of law in which the plaintiffs have no material interest; they have, incidentally, full enough lists without their being cluttered with points, however interesting to barrack room or indeed to practising lawyers, which someone desires to air without having such an interest.

There are indeed other good reasons why in its discretion the court should in any event decline to make a declaration in the instant case. It could have no effective result between the parties unless supported by a mandatory injunction to withdraw it. The defendants have, rightly in my view, roundly stated that they will not countermand it unless so enjoined by the court, for they refuse voluntarily to accept responsibility for the results. To withdraw it would be useless, produce confusion, and worsen the present situation, unless accompanied by a new order that it would be a disciplinary offence if a driver ever chose not to wait the full time at every adverse traffic light. Thinking of such a new order is something which the court has no power to enjoin and it is one which, as regards London, no chief officer in his senses would issue voluntarily. I would be no party to granting an injunction to countermand order 144/8 when that course could only result at best in confusion and at worst in unnecessary perils to life and property. Similarly I would decline to make a declaration that would have parallel effects. It is thus not strictly necessary to decide whether order 144/8 is or is not unlawful. It would suffice to say, as is the fact, that it is in the circumstances already related an eminently sensible order which reflects much credit on those who drafted and issued it—for it represents the only practicable solution in the public interest of the difficulties created by the Home Office refusal to take steps to amend the law. As, however, the question of its legality has been fully discussed, it is appropriate to say that as at present advised I fully support the view that, for the reasons given by PLOWMAN J at first instance, and those about to be stated in this court by BUCKLEY LJ, is is not unlawful.

Accordingly all the claims of the plaintiffs in this misconceived action fail and the appeal should be dismissed. It would be wrong, however, simply to leave the matter at that. The situation in which one department of the Home Office secures the passing of statutes and regulations which create offences and another of its departments issues instructions that resulting fines be paid out of public funds is an oddity which is no longer effective for its purpose. However smoothly it may have worked when the law relating to traffic offences was more simple, drivers of fire engines now have a genuine grievance. They are liable, however reasonably they act when 'on the bell', to have their driving record embarrassed by traffic light convictions which however technical may later need explaining away—and are at risk of finding by some misfortune an endorsement on their licence which ought not in justice to have been placed there. Rarely though this may occur, the system which can produce it is wrong.

(1) [1968] 2 All ER 686; [1970] AC 403.

(2) [1957] 2 All ER 436; [1957] 2 QB 550.

The plain fact is that, robot signals having replaced the human police officer, it is essential in the public interest that the law should be adjusted so as to enable them to be lawfully disobeyed in emergencies when that course does not involve danger to others. For reasons that have, I hope, now been made plain, the Home Office decision to refuse, despite the recommendation made to it, to procure an amendment of the law appears somewhat pusillanimous. It was bound in due course to lead to difficulties of the type that have arisen—and that could be quite simply avoided by, for instance, an amendment of s 79 of the Road Traffic Regulation Act 1967, so that an exemption somewhat similar to that relating to speed limits is applied, subject to appropriate safeguards, to other regulations in suitable cases. The sooner some such amendment is made the better. The present system puts chief officers and local authorities alike on a tight-rope—when even a correct step is liable to be misconstrued by malcontents as an attempt to use a dispensing power and when the slightest error may result in such an accusation being justified.

**BUCKLEY LJ:** Two things surprise me in this case: first, that the Home Office has not promoted any amendment of the law which affords no relaxation from traffic regulations relating to traffic light signals and road signs for any such vehicle as a fire engine or ambulance when travelling in answer to an emergency call, notwithstanding that this has been considered by the Department as the result of representations by the London Fire Brigade supported by the Central Fire Brigade Advisory Council; and, secondly, that the Fire Brigade Union has apparently resisted any such amendment. It is common knowledge that members of the public on a highway customarily give precedence to fire engines, ambulances, police cars and the like when the drivers of such vehicles indicate by the use of their bells, sirens and so forth that they are travelling on emergency service, but, although speed limits are relaxed, the driver of any such vehicle commits an offence if, for instance, he crosses a red light or goes the wrong side of a pedestrian island, however clear it may be that in so doing he runs no risk of causing an accident.

The chief fire officer says that it is well known in the fire services that the speed of attack is crucial to the control and extinguishment of a fire, and that the driver of a fire appliance knows this and knows that the risk to life and property is increased by any delay in getting to the fire. This is not in dispute. It has never been necessary to impress on drivers of fire engines the need to reach the incident with the least possible delay, and it is common ground that a keen, and indeed I would say a good, fireman driver, when driving on a call to a fire, will pass a red traffic light or drive on the wrong side of the road or disregard a road sign if this will save time and involve no risk of an accident. The London Fire Brigade has found it necessary to make regulations from time to time aimed at ensuring that drivers' eagerness to get to fires as quickly as possible does not lead to their taking risks. Automatic traffic lights were introduced in 1929, and the first such regulation relating to passing a contrary traffic light was made in 1933. These regulations have always stressed that drivers of fire brigade vehicles are under the same obligation at law to obey traffic light signals as the drivers of other vehicles, and have required any driver who proceeds against the lights to do so with the greatest care to avoid any risk of an accident. Order 144/8 of 3rd February 1967, which has given rise to the present case, follows this pattern and introduces, what was a new specific requirement, that a driver who decides to proceed against the lights should first stop his vehicle.

The plaintiffs are firemen who as crewmen have refused to obey orders to ride in the course of their duties on fire brigade vehicles the drivers of which are prepared to cross red traffic signals on the way to an emergency, when this can in their opinion safely be done. As the result of such refusal disciplinary proceedings have been launched against them. In this action they claim a declaration that order 144/8

is unlawful, a mandatory injunction to withdraw or countermand it, an injunction restraining the defendants from implementing it, and an injunction restraining them from continuing with the disciplinary proceedings.

Under the Road Traffic Act 1960, s 14, failure to comply with a traffic sign, where no policeman is regulating the traffic, is an absolute offence. We were told that when a fire engine is driven past a red light the driver is not in practice prosecuted unless he is thought to have driven carelessly or dangerously, but a driver who is prosecuted may be acquitted of careless or of dangerous driving but may nevertheless have to plead guilty to failure to obey the traffic signal and may be convicted of this lesser offence and have his licence endorsed accordingly. Indeed we were told that this does happen. Since the enactment of the Road Traffic Act 1962, s 5 (3), which provides for disqualification after three endorsements within three years, unless there are mitigating circumstances, an endorsement could in perhaps unlikely circumstances have drastic consequences for the licence holder. The existing state of affairs is one which consequently may confront fire brigade drivers with a dilemma of some significance which, as matters stand, each driver must resolve for himself on every occasion when he is presented with the problem whether to pass a red light. The view put forward by the union is that dangers are increased when drivers are given a discretion in this respect and that safeguards of the kind mentioned in order 144/8 are unlikely to operate as effective checks. On the other hand the chief fire officer in his evidence stresses that a few seconds' delay may make a great difference in the risk to life and property resulting from a fire, and that there are many occasions, particularly at night, when a fire brigade vehicle would be unnecessarily delayed by waiting for an adverse traffic light to change when it is clear that there is no other traffic about or that what traffic there is had given precedence.

For the plaintiffs it was submitted that order 144/8 was unlawful because it told drivers what to do, should they decide to commit offences. It was said to encourage breaches of the law. Next it was submitted that the defendants could not legally require crewmen to ride with drivers who, complying with the terms of the regulations, were willing in their discretion to commit breaches of the law. From this, it was submitted, it follows that the disciplinary proceedings were wrongful.

In my judgment, these arguments are misconceived. The regulation does not require drivers to commit any breach of the law or say that they can break the law with impunity. It emphasises that the law applies to them in the same way as to anyone else. Its purpose is to minimise the risks which may be involved in breaches of the law which in the exceptional circumstances of the fire service are likely to occur in consequence of the natural and, most people would say, praiseworthy, desire of men to do their utmost to save life. It says, in effect: 'Drivers must understand that they are subject to the law regarding traffic lights; but, if a driver decides to commit a breach of the law, taking the precautions as regards accidents prescribed by this regulation, he will not be disciplined within the service.' We were told that drivers who pass a red traffic light without taking those precautions are disciplined. On the other hand no driver who elects to observe the traffic regulations strictly is disciplined on that account. The regulation does not confer any discretion on drivers to break the law; it limits that discretion which they individually exercise. If order 144/8 were withdrawn the likelihood of drivers disregarding traffic signals in circumstances involving risks of accidents would, in my opinion, increase. The situation as it affects not only other road users but also crewmen on fire brigade vehicles would be less satisfactory than it is at present. In my judgment the claim that the regulation is unlawful fails.

If this is right, the rest of the plaintiffs' case also fails, for the alleged unlawfulness of the regulation has been cardinal to the rest of the argument of the plaintiffs' counsel.

The reason why the disciplinary proceedings are said to be wrongful is that the orders which the plaintiffs refused to obey were wrongful. It is conceded that these orders would not be wrongful but for the regulation, but it is said that they were wrongful because they required crewmen to ride with drivers who were prepared to pass adverse traffic lights in the circumstances contemplated by the regulation. The fallacy of the argument is, in my opinion, clear from the fact that, but for the regulation, the probability of drivers committing offences against the traffic regulations would increase, and yet it is accepted that in these circumstances crewmen could properly be required to ride with any driver.

I would only add that I think that it is a hard thing that drivers should be left at their own discretion to make decisions whether they should or should not commit breaches of the law which in many instances must be only technical but in others may involve difficult decisions. I would for myself think it much fairer to the drivers and generally more satisfactory that the law should prescribe in what circumstances and subject to what safeguards the drivers of such vehicles as fire engines and ambulances should be allowed to disregard traffic signals and road signs. I agree that this appeal fails.

*Appeal dismissed.*

Solicitors: W H Thompson; H F W Wilson, Solicitor to the Greater London Council.

G.F.L.B.

### CHANCERY DIVISION

(PENNYCUICK, V-C)

13th, 23rd November 1970

#### DOWTY BOULTON PAUL LTD v WOLVERHAMPTON CORPORATION

*Local Authority—Statutory powers—Enforcement—Assurance to company of land with access to and use of authority's property—Decision by authority to develop property as housing estate—Right to override company's rights.*

By a conveyance dated 30th November 1936, the defendant corporation, who owned and maintained a municipal airport under licence from the Board of Trade, assured unto the plaintiff company a parcel of some 23 acres of land adjoining the airport together with certain rights of access to and use of the airfield and airport buildings for the manufacturing, service, and repairs of aircraft and the running of a flying school. By cl 2 of the deed the plaintiff entered into various covenants so as to bind the land thereby conveyed for the benefit of the airport with a proviso that the covenants should remain in force for a period of 99 years from 1st December 1935, or for so long as the corporation should maintain the airport as a municipal aerodrome, whichever was the longer. The corporation covenanted to allow the plaintiff to use the airport for certain named purposes in connection with its business again with a proviso identical to that contained in cl 2. Clause 5 provided: 'Without prejudice to the corporation's right to use, dispose of or deal with the lands in and around [the airfield] and [the airfield] generally as and for such purposes as they shall from time to time think fit the corporation shall not in the exercise thereof unreasonably affect the rights of the use of the [airfield] hereby granted by the company'.

The corporation having determined not to renew their Board of Trade licence when it expired on 24th June 1971, and to develop the airport and the surrounding land as a housing estate under s 163 (1) of the Local Government Act 1933, the plaintiff now moved for an interlocutory injunction to restrain the corporation from doing anything which would cause the Board of Trade to determine the existing licence to use the airfield as an

airfield and/or to prevent the plaintiff from using the airfield for its lawful purposes under the deed of 30th November 1936.

**HELD:** the plaintiff had, for the purposes of the motion, made out a prima facie case as to its rights over the relevant land conferred by the conveyance, and the corporation had no power either under cl 5 thereof, or under the Local Government Act 1933, s 163 (1), to override those rights, or under the general law regarding the exercise of statutory powers.

**Per PENNYCUICK V-C:** The only remedy of the plaintiff company lies in damages and not by way of an injunction designed to enforce the conveyance.

**MOTION** by the plaintiff, Dowty Boulton Paul Ltd, for an interlocutory injunction against the defendants, Wolverhampton Corporation restraining the corporation from doing anything (i) which would cause the Board of Trade to determine the existing licence enabling Pendeford Aerodrome, Wolverhampton, to be used as a licensed airfield and (ii) to prevent the plaintiff company from using the airfield for their lawful purposes.

*K R Bagnall* for the company.

*George Newsom QC and Elizabeth Appleby* for the corporation.

*Cur adv vult*

23rd November. **PENNYCUICK V-C:** In this action the plaintiff is Dowty Boulton Paul Ltd, to which I shall refer as 'the company'. The defendants are the mayor, aldermen and burgesses of the county borough of Wolverhampton to whom I shall refer as 'the corporation'.

I have before me a motion whereby the company seeks an interlocutory injunction relating to an area of land at present in use by the corporation as an airfield but which the corporation intends to develop as a housing estate. The company is interested in this area under the terms of a conveyance dated 30th November 1936. That was a conveyance by the corporation to the company, by its then name of Boulton Paul Aircraft Ltd, of an area of land adjoining the airfield. The conveyance confers on the company certain rights to use the airfield, which rights will, of course, be nullified if the site of the airfield is developed as a housing estate. There had been an agreement in August 1935 between the corporation and the company for the grant by the corporation to the company of a long lease over the area subsequently comprised in the conveyance. The provisions of that agreement were manifestly superseded by the terms of the conveyance, and it is not necessary to refer to them. The conveyance contains a recital that the corporation is the estate owner of a plot of land, which is subsequently described by reference to a plan as a plot of some 23 acres coloured brown on the plan. The conveyance then proceeds as follows:

'1. IN consideration of the sum of One Thousand Six Hundred and Forty-five Pounds now paid by the company to the corporation (the receipt whereof the corporation hereby acknowledge) the corporation as beneficial owners and in pursuance of every statutory and other authority then hereunto enabling hereby grant unto the company [a piece of land lying in the parish of Wrottesley and just outside the boundaries of the county borough of Wolverhampton together with a small strip of land coloured blue]. Together ALSO with full right and liberty for the company and its successors in title the owners or occupiers of the property hereby assured its and their undertenants and servants for the purpose of obtaining access to the Wolverhampton Airport (hereinafter called "the airport") [the area of which is shown edged by a red verge line on the plan] in connection with its and their use of the said piece of land coloured brown on the said plan number 1 [that is the main area comprised in the conveyance] and the buildings erected or to be erected thereon as a factory for the

designing manufacturing assembling and repairing of aircraft and aeronautical equipment and as a school for the training and teaching of flying to go pass and repass along over and upon the strip of land coloured green on the said plan number 1 and adjoining the said piece of land coloured brown on the said plan number 1 on the southern side thereof for a period of ninety-nine years from the first day of December One thousand nine hundred and thirty-five or as long as the corporation shall maintain the airport as a municipal aerodrome whichever shall be the longer.'

By cl 2 the company enters into a number of covenants so as to bind the land thereby assured, and so as to benefit the adjoining lands of the corporation, namely, the airport. Then at the end of those covenants comes a proviso that all but one of those covenants shall remain in force and be binding on the company insofar as practicable:

'for a period only of ninety-nine years from the first day of December One thousand nine hundred and thirty-five or so long as the corporation shall maintain the airport as a municipal aerodrome whichever shall be the longer.'

By cl 3, the corporation enters into certain covenants with the company. Clause 3 (ii) is in these terms, so far as now material:

'That they will allow the company to use the airport when prepared for use and ready for the purposes of the company and licensed as an aerodrome (provided that the corporation shall not be obliged to license the aerodrome for night flying or as a customs aerodrome) so far as a licence is necessary to enable the company to use the airport for such purposes as are hereinafter in this clause mentioned free of charge except as hereinafter provided for the following purposes namely:—(a) For the purpose of test delivery and other flights in connection with their business of designing manufacturing assembling and repairing aircraft and parts thereof and accessories thereto. (b) For the purpose of flying in connection with their business of carrying on a school for the training and teaching of flying.'

There follows a proviso

'that the company shall pay a rental of fifty pounds per annum in respect of the user specified in paragraph (a) of this sub-clause and a further rental of fifty pounds per annum in respect of the user specified in paragraph (b) of this sub-clause while such users respectively continue.'

Then there is a proviso that the covenants by the corporation contained *inter alia* in cl 3 (ii):

'and each and every one of them shall remain in force and be binding upon the corporation for a period only of ninety-nine years from the first day of December One thousand nine hundred and thirty-five or so long as the corporation shall maintain the said Wolverhampton Airport as a Municipal Aerodrome whichever shall be the longer.'

Clause 5 is in these terms:

'without prejudice to the corporation's right to use dispose of or deal with their lands in and around the Airport and the Airport generally as and for such purposes as they shall from time to time think fit the corporation shall not in the exercise thereof unreasonably affect the rights of the use of the Airport hereby granted to the company.'



The corporation has since that time maintained the land edged red on the plan as a municipal airport. The airport is at present managed by a company known as Don Everall Aviation Ltd. The current Board of Trade licence will expire on 24th June 1971. The corporation does not intend to renew that licence, nor does it intend to renew the management agreement with Don Everall Aviation Ltd which will expire on 31st December 1970. Its intention is to close down the airfield and develop it as a housing estate.

The airfield itself has been regularly used by planes up to date, the last figure being 1,524 movements in a year. It should be explained that, when an aeroplane takes off and lands, each is a separate movement. The company has of late years made very little use indeed of the airfield. In 1969 there were 16 movements attributable to the company. There has been none in the current year. The corporation's expenditure on the airfield is now at the rate of about £12,000. The company contends that the corporation is not entitled by developing the airfield as a housing estate to deprive the company of the right which it obtained under the 1936 conveyance to use the airfield. In those circumstances, the company issued the writ in the present action on 22nd September 1970 and the statement of claim has been delivered. By the present notice of motion, which is dated 23rd September 1970, the company seeks an interlocutory injunction in the following terms, that

'the [corporation] shall do nothing which would cause the Board of Trade to determine the existing licence enabling Pendeford Aerodrome, Wrotesley, Wolverhampton to be used as a licensed airfield and shall do nothing to prevent the [company] from using the said airfield for their lawful purposes.'

The first issue which has arisen on the hearing of this motion is whether, under the terms of the 1936 conveyance or under the general law, the corporation is entitled to override the rights conferred on the company under the 1936 conveyance. If it is so entitled that would be the end of the matter; the corporation will do no wrong to the company if it does nullify those rights by developing the airfield as a housing estate and the company will have no remedy whether by way of injunction or damages or otherwise.

Counsel for the company was content to rely on the plain terms of the 1936 conveyance. Counsel for the corporation in the first place addressed an argument based on cl 5 of the conveyance. It will be remembered that that clause provides:

'without prejudice to the corporation's right to use dispose of or deal with their lands in and around the airport and the airport generally as and for such purposes as they shall from time to time think fit the corporation shall not in the exercise thereof unreasonably affect the rights of the use of the airport hereby granted to the company.'

It is not altogether easy to see what the effect of that clause is, and I think that I am doing him no injustice when I say that counsel for the corporation appeared to share that difficulty. I do not think that I can go beyond saying this, that, so far as I can see, the dominant intention shown by that very oddly-worded provision is that the corporation shall not 'unreasonably affect the rights of the use of the airport'. I quite appreciate that the clause opens 'without prejudice'. Maybe it really has no meaning at all. At any rate I do not think that that clause enables the corporation to override the rights of the company.

Counsel for the corporation's other contention, which, I think it is fair to say, was that on which he principally relied, was that, under the general law regarding the exercise of statutory powers, the corporation is at any time entitled to override this licence if it requires to use the airfield for any of its statutory purposes. These, of

course, include its powers as a housing authority. Counsel accepted that the grant of the licence under the 1936 conveyance was within the powers of the corporation. There was no argument on this point, and I proceed accordingly on the footing that the grant of the licence was indeed within the powers of the corporation. Counsel based his contention on the principle that a body entrusted with statutory powers cannot by contract fetter the exercise of those powers. He referred to a number of cases which establish beyond all doubt that principle. I refer shortly to three of those authorities.

In *Ayr Harbour Trustees v Oswald* (1) LORD BLACKBURN stated the principle in these terms:

'I think that where the legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void.'

The next case was that of *York Corp v Henry Leatham & Sons Ltd* (2), in which RUSSELL J made these observations. After citing the *Ayr Harbour* case and another case, he said:

'The same principle underlies many other cases which show the incapacity of a body charged with statutory powers for public purposes to divest itself of such powers or to fetter itself in the use of such powers . . . For the reasons which I have given I am of opinion that the Ouse agreement and the Foss agreement were agreements which were at the date of their execution ultra vires the plaintiffs.'

Finally, LORD PARKER CJ in *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* (3) said:

'There is a long line of cases to which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion.'

I have said that the principle laid down in those cases is established beyond doubt. That seems to me, however, a principle wholly inapplicable to the present case. What has happened here is that the corporation has made what is admittedly a valid disposition in respect of its land for a term of years. What is, in effect, contended by counsel for the corporation is that such a disposition—and, indeed, any other possible disposition of property by a corporation for a term of years, for example, an ordinary lease—must be read as subject to an implied condition enabling the corporation to determine it should it see fit to put the property to some other use in the exercise of any of its statutory powers. Nothing in the cases cited supports this startling proposition. The cases are concerned with attempts to fetter in advance the future exercise of statutory powers otherwise than by the valid exercise of a statutory power. The cases are not concerned with the position which arises after a statutory power has been validly exercised. Obviously, where a power is exercised

(1) (1883), 8 App Cas 623.

(2) [1924] 1 Ch 557; [1924] All ER Rep 477.

(3) 125 JP 348; [1961] 2 All ER 46; [1962] 1 QB 416.

in such a manner as to create a right extending over a term of years, the existence of that right pro tanto excludes the exercise of other statutory powers in respect of the same subject-matter, but there is no authority and I can see no principle on which that sort of exercise could be held to be invalid as a fetter on the future exercise of powers.

Counsel for the corporation did not cite any authority in support of his contention apart from the line of cases to which I have referred. Nor was any authority directly in point to the contrary cited. I think, however, that, having had an opportunity of considering this case before giving judgment, I ought to refer to the decision of the Court of Appeal in *Stourcliffe Estates Co Ltd v Bournemouth Corpn.* (1) I do so with some diffidence, since that case was not cited by either counsel. The headnote is in these terms:

'When a corporation purchases land by agreement for any of the purposes for which it is authorized to acquire land by the Public Health or other public Acts, or by its special local Acts, it is not ultra vires for the corporation to enter into covenants with the vendor restricting the erection of buildings upon the land purchased which it might erect under other powers given to it for the benefit of the public, provided that such restrictions do not prevent the user of the land for the particular purposes for which it was acquired.'

It will be seen that, in that case, the corporation had purchased property subject to a restriction in favour of the vendor which it claimed to be entitled to override in the exercise of other statutory powers. The Court of Appeal, affirming PARKER J, negated the contention on the part of the corporation. I will read a few sentences from the judgment of SIR HERBERT COZENS-HARDY MR:

'But, further, if they have taken this conveyance of this land in terms subject to these restrictive covenants, can they hold it free from those restrictions? That again is a proposition which seems to me to be startling. If the deed is wholly ultra vires I can understand it, but to suppose that the corporation could be allowed to retain the land and to repudiate the consideration or part of the consideration for it is a proposition to which certainly I could not give my adhesion.'

That last sentence *mutatis mutandis* appears to me to be precisely in point in the present case. I say '*mutatis mutandis*', because here, of course, the corporation was the vendor, and what it is retaining is not the land as in the *Bournemouth* case (1) but the purchase price. Having said that, SIR HERBERT COZENS-HARDY MR proceeded to consider the *Ayr Harbour* case (2) and concluded:

'In principle the case of *Ayr Harbour Trustees v. Oswald* seems to me to be entirely different, and there is, so far as I am aware, no authority whatever to justify the proposition which has been contended for [by the Bournemouth corporation]...'

I have thought it right to refer to that case although it was not cited. When this action comes on for hearing there will, no doubt, be full argument on it.

Reference was made to s 163 of the Local Government Act 1933 which, with certain amendments not now material, is still in force. Subsection (1) provides:

'Any land belonging to a local authority and not required for the purposes for which it was acquired or has since been appropriated may be appropriated

(1) 74 JP 289; [1910] 2 Ch 12; [1908-10] All ER Rep 785.

(2) (1883), 8 App Cas 623.

for any other purpose approved by the Minister for which the local authority are authorised to acquire land . . .'

That section does not, it seems to me, empower a local authority to override any right over the land in question which may be vested in another party. The purposes in the context of that section are clearly those of the local authority.

I conclude for the purpose of this motion that the company has made out a *prima facie* case that it is entitled to this right and that the corporation is not entitled to override that right either under the terms of the 1936 conveyance or in exercise of its statutory powers.

I turn now to consider the remedy available to the company should the corporation persevere in its intention to appropriate this land for housing. It seems to me that the remedy of the company must lie in damages only and that the company is not now entitled, and will not be entitled at the hearing of the action, if it is then otherwise successful, to any relief by way of injunction or mandatory order. The right vested in the company necessarily involves the maintenance of the airfield as a going concern. That involves continuing acts of management, including the upkeep of runways and buildings, the employment of staff, compliance with the Civil Aviation Act 1949, and so forth, ie in effect the carrying on of a business. That is none the less so by reason that so far the corporation has elected to engage Don Everall Aviation Ltd to manage the airfield on its behalf. It is very well established that the court will not order specific performance of an obligation to carry on a business or, indeed, any comparable series of activities. See in this connection 36 Halsbury's Laws (3rd Edn) pp 267-269, paras 365, 366:

'The court does not enforce the performance of contracts which involve continuous acts and require the watching and supervision of the court . . .

'A judgment for specific performance is not pronounced, either at the suit of the employer or the employee, in the case of a contract for personal work or service . . . This principle applies not merely to contracts of employment, but to all contracts which involve the rendering of continuous services by one person to another, as, for instance, a contract to work a railway line.'

The cases cited in the note under that last sentence are a number of cases in the middle of the last century. It would not be useful to refer to them. The principle is established, I should have thought, beyond argument. For this purpose there is no difference between an order for specific performance of the contract and a mandatory injunction to perform the party's obligation under the contract. In the present case, the notice of motion is expressed as one for a negative injunction, but one has only to look at it to see that it does involve a mandatory order on the corporation to maintain the airfield. In order that the corporation could continue to allow the company to use the airfield, it is essential that the corporation should maintain the airfield. It would be quite impossible for the company to use the airfield if the corporation did not maintain it. So an injunction in the terms asked would put on the corporation a duty, to be observed for something over 60 years, to maintain the airfield. I was referred in connection with mandatory orders to *Redland Bricks Ltd v Morris* (1) in the House of Lords, and in particular to the statement by LORD UPJOHN.

What is sought now is considerably a *fortiori* the ordinary mandatory order. It is unnecessary in the circumstances to discuss whether damages would be an adequate remedy to the company.

I conclude, therefore, in the first place, always so far as this interlocutory motion is concerned, that the company has made out a *prima facie* case that it is entitled

(1) [1969] 2 All ER 576.

to the right conferred by the 1936 conveyance, and that the corporation will do an actionable wrong if it prevents the company from exercising that right. I conclude further that the remedy and the only remedy of the company lies in damages, with the consequence that I must make no order on this motion.

*No order made.*

Solicitors: Gregory, Rowcliffe & Co, for Midwinter, Jones & Co, Cheltenham; Sharpe, Pritchard & Co, for R J Meddings, Wolverhampton.

P.P.

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### HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD GUEST, VISCOUNT DILHORNE AND LORD PEARSON)

1st, 2nd, 31st March 1971

#### KEANE v GOVERNOR OF BRIXTON PRISON

*Extradition—Ireland—Order by magistrate in England—Duty to inquire into merits of charges—Prosecution for political offence if order made—Backing of Warrants (Republic of Ireland) Act, 1965, s 2 (1) (2) (b).*

The appellant was arrested in England under the authority of a provisional warrant issued by a justice of the peace under s 4 of the Backing of Warrants (Republic of Ireland) Act, 1965. Two days later two Irish warrants for his arrest were endorsed by a justice of the peace in England under s. 1 of the Act, one charging him with murder and the other charging him with armed robbery. Under s 2 (1) of the Act he was brought before a metropolitan magistrate who ordered him to be handed over to the Irish authorities and remanded him in custody until that could be done. The appellant then applied for a writ of habeas corpus. The Divisional Court refused the application, and the appellant appealed.

**HELD:** section 2 of and the schedule to the Act did not impose any duty on the magistrate to inquire into the merits of the charges to ascertain whether there was a prima facie case for the prosecution or evidence to connect the appellant with the alleged offences; the provision in s 2 (b) that an extradition order should not be made if it appeared that there were substantial grounds for believing that the person named in the warrant would, if taken to the Republic of Ireland, be prosecuted or detained for another offence, being an offence of a political character, related to an offence already committed or alleged to have been already committed, and the appellant could not bring himself within the subsection by showing that, if he were returned to Ireland he was likely so to conduct himself in the future that he would bring on himself prosecution or detention for future political offences; therefore the appeal would be dismissed.

**APPEAL** by Patrick Francis Keane against an order of a Queen's Bench Divisional Court, reported p 38 ante, dismissing his application for a writ of habeas corpus directed to the governor of Brixton Prison.

Sir Arthur Irvine QC and J H C Goldie for the appellant.

E J P Cussen and K A Richardson for the respondent.

Their Lordships took time for consideration.

31st March. The following opinions were delivered.

**LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD GUEST and VISCOUNT DILHORNE**, said that they agreed with the following reasons given by LORD PEARSON for dismissing the appeal.

**LORD PEARSON:** This was an appeal from a decision of a Queen's Bench Divisional Court refusing an application for a writ of habeas corpus in a case arising under the Backing of Warrants (Republic of Ireland) Act 1965.

The appellant was arrested in England on 13th May 1970 under the authority of a provisional warrant issued by a justice of the peace in England under s 4 of the Act. On 15th May two Irish warrants for the arrest of the appellant were endorsed by a justice of the peace in England under s 1 of the Act. One of these warrants charged the appellant with the murder of Richard Fallon, a member of the police force of the Republic acting in the course of his duty, on 3rd April 1970, at Arran Quay in Dublin. The other charged him with armed robbery in Rathdrum, County Wicklow, on 20th February 1970. The legality of the arrest and initial detention of the appellant under the Act is not questioned. The questions arise at the next stage. Under s 2 of the Act the appellant was brought before a magistrate's court in England and the court on 14th August 1970 made an order under sub-s (1) of that section. As questions of construction are involved, it will be convenient to set out in full the provisions of that section and the first four paragraphs of the schedule which is referred to in sub-s (4) of that section:

'2. *Proceedings before magistrates' court* (1) So soon as is practicable after a person is arrested under a warrant endorsed in accordance with section 1 of this Act, he shall be brought before a magistrates' court and the court shall, subject to the following provisions of this section, order him to be delivered at some convenient point of departure from the United Kingdom into the custody of a member of the police force (Garda Síochána) of the Republic, and remand him until so delivered.

'(2) An order shall not be made under subsection (1) of this section if it appears to the court that the offence specified in the warrant does not correspond with any offence under the law of the part of the United Kingdom in which the court acts which is an indictable offence or is punishable on summary conviction with imprisonment for six months; nor shall such an order be made if it is shown to the satisfaction of the court—(a) that the offence specified in the warrant is an offence of a political character, or an offence under military law which is not also an offence under the general criminal law, or an offence under an enactment relating to taxes, duties or exchange control; or (b) that there are substantial grounds for believing that the person named or described in the warrant will, if taken to the Republic, be prosecuted or detained for another offence, being an offence of a political character or an offence under military law which is not also an offence under the general criminal law.

'(3) In the case where the court does not make an order under subsection (1) of this section, the court shall order the person named or described in the warrant to be discharged.

'(4) The provisions of the schedule to this Act shall apply in relation to proceedings under this section.

#### 'SCHEDULE

'1. Paragraphs 2 to 4 of this schedule shall apply to proceedings in England or Wales under section 2 of this Act.

'2. The court shall consist of at least two justices and shall sit in open court in a petty-sessional court-house or an occasional court-house: Provided that section 121 of the Magistrates' Courts Act 1952 (sittings of stipendiary and other magistrates) shall apply as if the foregoing provisions of this paragraph were contained in that Act.



'3. Subject to paragraph 2 of this schedule, the court shall have the like powers, including power to adjourn the case and meanwhile to remand the person arrested under the warrant either in custody or on bail, and the proceedings shall be conducted as nearly as may be in the like manner as if the court were acting as examining justices inquiring into an indictable offence alleged to have been committed by that person.

'4. Without prejudice to the generality of paragraph 3 of this schedule, section 5 of the Costs in Criminal Cases Act 1952 (award of costs by examining justices out of local funds) and section 2 of the Poor Prisoners Defence Act 1930 (legal aid before examining justices) shall apply in relation to the proceedings as if the person arrested under the warrant were charged with an indictable offence on the prosecution of the constable on whose application the warrant was endorsed and, where the court discharges that person, as if it had determined not to commit for trial.'

After the making of the order by the stipendiary magistrate at Old Street Magistrates' Court, in London, under s 2, the appellant exercised his right under s 3 to apply for a writ of habeas corpus within the time allowed. It has been contended on behalf of the appellant that a writ of habeas corpus should be issued for two reasons: (i) that the magistrate should have made, and did not make, an enquiry into the merits of the charges, so as to ascertain whether there was a *prima facie* case for the prosecution or at any rate evidence to connect the appellant with the alleged offences; (ii) with reference to s 2 (2) (b), that there are substantial grounds for believing that the appellant will if taken to the Republic be prosecuted or detained for another offence being an offence of a political character. The Divisional Court which heard the application rejected both of these contentions and refused the application, but granted to the appellant leave to appeal to your Lordships' House.

As to the appellant's first reason, it is correct to say that the magistrate made no enquiry into the merits of the charges, and the only question is whether he had any duty to do so. In my opinion, on the proper construction of s 2 and the schedule he had no such duty. The scheme of s 2 is that under sub-s (1) the court is 'subject to the following provisions of this section' obliged to make the order; under sub-s (2) the order is not to be made if something 'appears to the court' or if something 'is shown to the satisfaction of the court'; the issues which the court may have to try are those provided by sub-s (2), and there is no provision for the court to try any issue, or make any enquiry, as to the merits of the charges. Subsection (4) provides that 'The provisions of the schedule to this Act shall apply in relation to proceedings under this section'. That language in itself suggests that the schedule will deal with procedural matters, and when the schedule is considered it is plainly dealing only with procedural matters. Paragraph 2 provides for the minimum number of justices to constitute the court and for the place of sitting and for sitting in open court. Paragraph 3 (on which main reliance was placed on behalf of the appellant) confers specific powers to adjourn the case and meanwhile to remand the person arrested under the warrant either in custody or on bail, and adds the general provision

'and the proceedings shall be conducted as nearly as may be in the like manner as if the court were acting as examining justices inquiring into an indictable offence alleged to have been committed by that person.'

I emphasise both the words 'in the like manner' as referring to the manner in which proceedings are to be conducted and not to issues to be tried, and also the association of the general provision with the preceding specific procedural provision. Paragraph 4 also refers to specific procedural matters. In my opinion, s 2 of and the schedule to

the Act do not provide for any enquiry by the magistrate into the merits of the charges. On this point I agree with the decision of the Divisional Court in the present case and with the previous decision in *Re Arkins* (1).

As to the appellant's second reason, when the application was made to the magistrate under s 2 of the Act, it was for the magistrate to decide, on the evidence adduced before him, the question whether

'there are substantial grounds for believing that the person named or described in the warrant will, if taken to the Republic, be prosecuted or detained for another offence, being an offence of a political character.'

The existence of the substantial grounds for belief has, under the express provisions of s 2 (2), to be shown to the satisfaction of the magistrate. The magistrate did not state any reasons for his decision, but as he made the order it must be inferred that he was not satisfied of the existence of such grounds. At the hearing before the Divisional Court on the application for a writ of habeas corpus further evidence by affidavit from the appellant and other persons was admitted and taken into account. No question has been raised in this appeal as to the procedure or powers of a Divisional Court when hearing an application for a writ of habeas corpus under s 3 of the Act. LORD PARKER CJ, with whom ASHWORTH and BROWNE JJ agreed, said:

'The question as I see it is, accepting all that the applicant has said, is it a case where any reasonable court must come to the conclusion that there are substantial grounds for believing that he will be prosecuted for a political offence?'

LORD PARKER summarised the effect of the evidence given by the appellant himself—orally before the magistrate and by affidavit in the habeas corpus proceedings—and the argument based on it as follows:

'I do not propose to go through it in any detail, but what he in fact says quite shortly is that he is a man who all his life has conducted considerable political activities and at one time was a member of the Irish Republican Army. More recently he has organised or been the leading member in a new political organisation called Free Ireland, which, he says, has attracted considerable and persistent interest and attention from the Irish police and the Irish government. He goes on to say that, although that organisation is not illegal, it could be made illegal at any moment by the introduction of the Offences Against the State Act 1939. If it were in the future made illegal, then he, as a leading member of it, if he persisted in his political activities (and as counsel for the applicant put it, he is a political animal who will go on doing this), might be detained and indeed prosecuted under those Acts, and the offences alleged would undoubtedly then be of a political character. That is the first way he puts it. The second is to say: Well, I have served a sentence of imprisonment for attempted arson, carrying firearms, and common assault in October 1967 which arose out of an attack on the headquarters of the Fianna Fail, the government party office, presumably a political offence, showing that he is, as he undoubtedly is, a political animal. He refers also to the fact that on a number of occasions he has been detained for a matter of a day or two days, and that he has always got the police, as it were, on his tail watching what he is doing. He refers in particular to an armed robbery on a bank in Newbridge in respect of which he was arrested and detained for some nine weeks before he was granted bail, and when it came to trial some time later the prosecution entered a nolle prosequi. In

(1) 130 JP 427; [1966] 3 All ER 651.

other words he is really saying: I am a political animal, I am watched very closely, and if I carry on my political activities, as I am going to, I may from time to time be detained.'

At the hearing before the magistrate, after an English detective sergeant had given evidence proving the arrest and identifying the applicant with the person named in the warrants, a superintendent of the police force of the Republic gave evidence in the course of which he produced an affidavit of the Attorney-General of the Republic. The Attorney-General in para 3 of his affidavit stated that, in the event of the applicant being returned to the Republic under the Act, the Attorney-General was prepared to give and did give an undertaking that the applicant would not be put on trial in the Republic except on the charges referred to in the warrants. Afterwards on 24th September 1970 for the purposes of the habeas corpus proceedings the Attorney-General of the Republic made a further affidavit stating:

'on the evidence available to me there is no intention to make use of the provisions of the Offences against the State Act, 1939 as amended by the Offences against the State (Amendment) Act, 1940 against the [applicant].'

In my opinion, whatever the position may be under other enactments (see *Armah v Government of Ghana* (1)), assurances such as are contained in these two affidavits are properly admissible and can properly be taken into account under s 2 (2) (b) of the Act, although, in view of the uncertainty of future developments and the possibility of new political situations and exigencies arising, they should not be regarded as conclusive.

LORD PARKER CJ rejected the argument for the appellant under s 2 (2) (b) on two grounds. First, he said that the words 'another offence' in s 2 (2) (b) mean only another offence in substitution for the offences charged in the warrants. The consequence would be that, if the appellant were likely to be charged both with the offences charged in the warrants and also with an offence of a political character, s 2 (2) (b) would give no protection. But I think this construction introduces into s 2 (2) (b) a limitation which is not justified by its language or its manifest object. In my opinion, s 2 (2) (b) would give protection if there were a likelihood of prosecution or detention for a political offence whether in substitution for or in addition to the non-political offences charged in the warrants.

LORD PARKER's second ground was in effect that for the purposes of s 2 (2) (b) 'another offence' must be an offence already committed or alleged to have been already committed. With this ground I agree. It is not enough to show that the applicant, if returned to his own country, is likely so to conduct himself in the future that he will bring on himself prosecution or detention for future political offences or alleged political offences. He will now be sent back to the Republic to stand his trial on the two non-political charges referred to in the warrant. There are no substantial grounds for believing that he will be put on trial for any past offence or alleged offence, of a political character. In my opinion, the application for a writ of habeas corpus was rightly refused.

*Appeal dismissed.*

Solicitors: B M Birnberg & Co; Director of Public Prosecutions.

G.F.L.B.

(1) [1966] 3 All ER 177, [1968] AC 192.

**COURT OF APPEAL (CRIMINAL DIVISION)**

(SACHS AND FENTON ATKINSON, LJ, AND MARS-JONES, J)

11th February 1971

R v BAXTER

*Criminal Law—Obtaining property by deception—Attempt—Fraudulent claim posted abroad—Letter received by addressee in England—Theft Act 1968, s 15 (1).*

The appellant was convicted at Liverpool Crown Court of attempting to obtain property by deception. He had posted in Northern Ireland letters addressed to football pool promoters in Liverpool making fraudulent claims to winnings. The letters were received by the promoters in Liverpool. At no time during the material period had the appellant been in England. At the trial the recorder overruled a submission by the defence that the attempt had been completed in Northern Ireland and was not within the jurisdiction of an English court.

**HELD:** the ruling was correct, and the offence was within the jurisdiction of the court of trial because the attempt was being committed by the appellant at every moment of the period between the commission of the proximate act necessary to constitute the attempt and the time when the attempt finally failed, i.e. when the contents of the letter came to light on the premises in Liverpool where they were meant to produce the intended result; alternatively, it could be said that any person who despatches a missile or missive arranges for its transport and delivery, which are essential parts of the attempt, and, therefore, in the present case part of the attempt had been committed in England, the physical personal presence of the offender in England not being an essential part of an offence committed in England.

**APPEAL** against conviction and sentence at Liverpool Crown Court by Robert Baxter, who was convicted on three counts of attempting to obtain property by deception and was sentenced to concurrent terms of 12 months' imprisonment.

G H Wright for the appellant.

I H M Jones QC and M Nunan for the Crown.

**SACHS LJ** delivered this judgment of the court: On 25th June 1970 after a ten-days trial at Liverpool Crown Court the appellant was convicted on three counts of attempting to obtain property by deception. He was sentenced by the recorder to 12 months' imprisonment on each count concurrent. The substantive offences which it was attempted to commit fell within s 15 (1) of the Theft Act 1968. Section 15 (2) provides:

'For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control . . .'

To show how the point of law has arisen which now falls for the decision of this court it is sufficient to state in broad outline the facts relating to the three counts. As regards the first and second counts, it was shown that the appellant on 25th May and 15th June 1969 respectively despatched from Northern Ireland two football pool claims, the first addressed to Littlewoods in Liverpool and the second to Vernons, also in Liverpool. In each case a claim was made for winnings on the basis of a copy coupon for the previous day's matches enclosed in the letter of claim. If accepted, the claim against Littlewoods would have produced winnings of £1,100 and that against Vernons £600. Each of these claims was made in the appellant's own name. Neither was accepted, but each was pressed by the appellant in a series of communications despatched from Northern Ireland and, in the Littlewoods case, in the course of an interview with an investigator. In both cases the appellant at one stage or another resorted to threats of publicity if the claims were not met promptly. It is

not necessary for the purposes of this judgment to set out the exhaustive researches that had to be made as a result of those claims or the way in which in the end their bogus and fraudulent nature was exposed to the jury, with the result that verdicts of guilty were very rightly returned. There is no suggestion that the summing-up can be impugned on any question of law or fact with which it dealt.

Count 3 related to a claim despatched from Northern Ireland from the address of the appellant's sister who lived in the same area as he did. This claim, dated 28th September 1969, again related to a copy coupon for the previous day's matches. No trace was found again of the original coupon and again the claim was rejected. On this occasion, however, the letter purported to come from a Miss E Nevin. Miss E Nevin was a bogus entity; and there was evidence from a handwriting expert that the writing on the copy coupon was very similar to that of the appellant. The jury had ample evidence entitling them to come to the conclusion that this was a third fraudulent claim by the appellant. If met it would have produced £4,171. Again as regards that count nothing has been and nothing could be properly suggested against the validity of the summing-up in relation either to fact or to law. Moreover, as the learned recorder said when it came to the question of sentence, the verdicts were returned on the clearest possible evidence.

As regards each of the three cases, it is of course clear that the claims were prepared in and despatched from Northern Ireland and that at no time in the course of the period from the moment of despatch till the moment the claims finally failed did the appellant leave Northern Ireland. All the other communications by which the appellant followed up the claims the subject of counts 1 and 2 were in fact sent from Northern Ireland. It is equally clear that the object of the false pretences was to get money despatched from the respective offices of Littlewoods and Vernons in Liverpool. Had the attempt succeeded, the obtaining would clearly have been within the jurisdiction. Although this has been contested on behalf of the appellant, the authorities are wholly against him. They include the case of *R v Ellis* (1) and also *R v Harden* (2) where it deals with a point on which it has not been criticised in *Treacy v Director of Public Prosecutions* (3).

The point now taken is, in short, that when the relevant letters were posted the attempts were complete and the appellant never having left Northern Ireland during the period in question no criminal act had been committed within the jurisdiction of the courts of this country. That point was one taken in the Liverpool Crown Court before the appellant was arraigned, with a view to having the indictment quashed. The submissions on it extended to some three days and it is to be observed that those made on behalf of the appellant occupy some 110 pages of single-space foolscap transcript. In the course of those submissions a very large number of authorities were cited dealing with the position as regards various specific offences. In an admirably compact ruling given by the recorder, he ended by stating his view as follows:

'The conclusion to which I have come is that the attempts in this case were of a continuing nature. Whenever the [appellant] posted one of his fraudulent letters in Northern Ireland he set in motion a train of events for which he was solely responsible, the transportation of the letter to Liverpool and its delivery to and reading by the addressee. The reality of the situation is that the misrepresentations were designed to be made in England and were made there by the [appellant's] use of the post. Whether or not these offences are also triable in Northern Ireland, I am of the opinion they are triable here.'

(1) 62 JP 838; [1899] 1 QB 230.

(2) 126 JP 130; [1962] 1 All ER 286; [1963] 1 QB 8.

(3) p 112 ante; [1971] 1 All ER 110.

Before the recorder and again in this court no case has been cited which deals with jurisdiction where the offence charged is such an attempt. This court has been able to find little or no guidance from those quoted at first instance or indeed those quoted here though it has naturally found assistance from the general approach adopted in *Treacy v Director of Public Prosecutions* (1), a case decided by the House of Lords about a month after the verdicts were returned in the instant case. The older authorities deal *inter alia* with the origin of the rule relating to jurisdiction; they underline as LORD DIPLOCK pointed out in *Treacy v Director of Public Prosecutions*, that in modern times its only substantial foundation is based on international comity which leans against the courts of this country punishing those who in another country have done something which neither has caused nor could cause injury to persons or property here. It has been said that as regards the various parts of the United Kingdom there may be some variation in the principle to be applied by virtue of express provisions in a constitution, but there does not appear any difference in principle touching the particular issue now before this court. It is thus to be observed at the outset that the present case concerns acts by which injury could be caused and was intended to be caused to persons in this country.

Apart from references to the above principle, the bulk of the older authorities are of no real assistance in the instant case any more than they were in *Treacy's* case. That is because the offence of attempting to commit a crime is one which is in substance *sui generis*. There being no direct authority dealing with a case such as that now before us, it seems best first to examine the elements of the particular offence and to consider what is the position as regards jurisdiction apart from authority—one relevant question being whether anything has been done in this country which could cause injury here.

An attempt to commit a crime is established by proving an intent to commit it and in addition proving that in pursuance of that intent something has been done that is more than a mere preparation and is sufficiently proximate to the intended offence (cf *Jones v Brooks* (2)). Obviously the period between the moment the proximate act or acts commence and the time they finally fail may vary immensely. At any moment of that period, however, it is plainly true to say of the offender, 'He is attempting to commit that crime'. It matters not whether on any particular set of facts the attempt is best described as a continuing offence (as where a time bomb set to explode at a given hour in this country is being sent by rail) or as a series of offences (as where there are a series of blows on a cold chisel to force a door open). If the time bomb is discovered on the train, it matters not whether it is known on which side of some border it was placed there. At the moment of discovery it can plainly be said of the person who put it there that he is attempting to cause an explosion. The position is no different if what is being transmitted is a letter and the moment when its contents come to light occurs on the premises where it is meant to produce the intended result, an obtaining by deception of money from someone within the jurisdiction. The attempt has occurred within the jurisdiction. On those principles it is accordingly manifest that there is no reason why the jurisdiction of the courts here should not attach to the offence. An alternative, but no less effective, way of expressing the matter is to say that he who despatches a missile or a missive arranges for its transport and delivery (essential parts of the attempt) and is thus committing part of the crime within the jurisdiction by the means which he has arranged. The physical personal presence of an offender within this country is not, according to our law, an essential element of offences committed here.

There is certainly no authority against the above conclusions. Such dicta as can be

(1) p 112 ante; [1971] 1 All ER 110.

(2) (1968), 52 Cr App Rep 614.



found strongly favour it. It is sufficient simply to mention one or two of the well selected passages quoted in the ruling of the learned recorder. Thus in *R v Rogers* (1) a venue case where the charge was embezzlement, FIELD J said:

'A letter is intended to act on the mind of the recipient, its action upon his mind takes place when it is received. It is like the case of the firing of a shot, or the throwing of a spear. If a shot is fired, or a spear thrown, from a place outside the boundary of a county into another county with intent to injure a person in that county, the offence is committed in the county within which the blow is given.'

Again in *R v Oliphant* (2) there occurs in the judgment of LORD ALVERSTONE CJ a relevant passage:

'I am unable to draw any distinction between sending information by post or by telephone and giving the same information by direct personal communication in London.'

Finally, in 10 Halsbury's Laws (3rd Edn) p 318, para 581, it is stated:

'If a person, being outside England, initiates an offence, part of the essential elements of which take effect in England, he is amenable to English jurisdiction.'

—a passage which correctly states the law.

At this juncture it is convenient in connection with the older authorities concerned with obtaining money or chattels by false pretences to mention a point of some importance in relation to the Theft Act 1968. That is an Act designed to simplify the law—it uses words in their natural meaning and is to be construed thus to produce sensible results; when that Act is under examination this court deprecates attempts to bring into too close consideration the finer distinctions in civil law as to the precise moment when contractual communications take effect or when property passes. Some at least of the reasoning in those older authorities may well no longer be relevant because s 15 (2) of the Theft Act 1968 provides that property is to be treated as being obtained *inter alia* when possession or control passes: previously, as can be seen from the summary of the relevant law in Archbold's Criminal Pleading, Evidence and Practice, the passing of possession or control was not necessarily enough for the purposes of the offence charged.

The case put forward on behalf of the appellant is, as already indicated, that the offence was complete when the fraudulent letter was posted by the appellant in Northern Ireland and that nothing which happened afterwards was relevant. On that footing one would only, to change the metaphor, have regard to the pulling of the trigger and not to the arrival of the missile. Indeed it was urged on behalf of the appellant that if a bullet was fired by the appellant on one side of the border at someone in this country and it missed or did no damage, there would be no offence. How such a submission can be brought within the four corners of principles relating to international comity defeats comprehension. Incidentally, it would involve holding that the jurisdiction of the courts of this country depended on whether the missile was effective or not. This court can see no warrant for this conclusion.

Up to this point only passing reference has been made to the decision in *Treacy v Director of Public Prosecutions* (3) (which concerned a demand with menaces posted in this country to someone in Germany) because the court today has so far been dealing with the issue before it on broad grounds. It is appropriate, however, to say, first,

(1) 42 JP 37; (1877), 3 QBD 28.

(2) 69 JP 230; [1905] 2 KB 67.

(3) p 112 ante; [1971] 1 All ER 110.

that there is nothing in the above decision which in any way militates against the views so far expressed in this judgment; secondly, there is much in it to support them. Indeed on a narrower ground it might be said to conclude the issue against the appellant. The attempt to obtain the money by deception in the shape of a letter can be likened to the demand by letter which was under consideration in the House of Lords; and it appears that all their Lordships were disposed to hold that had it been a case of a demand despatched abroad which had arrived in England, there would have been jurisdiction here to try the offence—indeed three of their Lordships specifically so stated. Accordingly this court has no hesitation in saying that the issue before it is simple of resolution, that the ruling given by the learned recorder was manifestly correct, and that the offences in issue clearly fell within the jurisdiction of the courts of this country.

It is perhaps not without interest to note that the decision of this court today accords in essence with one reached in the United States as long ago as 1893 in *Simpson v The State* (1), a case cited by Professor Glanville Williams in 'Venue and the Ambit of Criminal Law'. That was a case where a bullet fired in South Carolina missed the man at whom it was aimed in Georgia and merely struck the water by his boat. The judgment in the Supreme Court of Georgia referred in somewhat picturesque terms to the act of the accused as follows:

'He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was, therefore, in a legal sense, after the ball crossed the state line, up to the moment that it stopped, in Georgia. It is entirely immaterial that the object for which he crossed the line failed of accomplishment.'

That judgment was of course based on the constructive presence of the accused in Georgia, a concept which the law of this country has not found it necessary to adopt. It produces exactly the same result.

In conclusion, this court feels impelled to state that its jurisdiction is so plain that it did not feel any need to call in detail for any massive citation of authorities. The appeal is dismissed.

*Appeal dismissed.*

Solicitors: Registrar of Criminal Appeal; R H Nicholson, Liverpool.

T.R.F.B.

(1) (1893), 92 Ga 41; 17 SE Rep 984.

QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, MELFORD STEVENSON and COOKE, JJ)

18th February 1971

TEHRANI AND ANOTHER v ROSTRON

*Gaming—Registration—'Club'—Refusal to register or renew registration—Members' clubs only included—Registration not applicable to proprietary clubs—Gaming Act, 1968, Sch 7, para 8.*

By para 8 of Sch 7 to the Gaming Act, 1968, a licensing authority may refuse to register or to renew the registration of a club under Part III of the Act on certain specified grounds.

The word 'club' in this paragraph refers only to members' clubs. No proprietary club may be registered under Part III of the Act.

CASE STATED by the recorder of Brighton.

On 4th December 1970, the recorder dismissed an appeal by the appellants, Mohammed Ali Yazdian Tehrani and Mohammed Yazdian Tehrani, from a decision of the justices for the borough of Brighton sitting as a gaming licensing committee that on the application of the respondent chief officer of police, William Roston, the registration under Part III of the Gaming Act 1968 of the appellants' club, which was a proprietary club, should be cancelled.

J C C Blofeld for the appellants.

D H Farquharson for the respondent.

**LORD PARKER CJ:** This is an appeal by way of Case Stated from a decision of the recorder of Brighton which was given in the following circumstances. On 26th May 1970 the appellants made an application under Part III of the Gaming Act 1968 in respect of a proprietary club known as the Kolbeh Club at Brighton. That application was made to the gaming licensing committee consisting of justices, who granted the application for registration. Three days later the respondent, as he was entitled to, preferred an application under Sch 7, para 13, to the Gaming Act 1968 for the cancellation of that registration, the ground put forward being that the club, which was admittedly a proprietary club, was not a bona fide members' club pursuant to para 18 of Sch 7. The matter came before the justices acting as the gaming licensing committee, and they acceded to that application and cancelled the registration certificate. From that decision of the justices the appellants appealed, and the recorder dismissed that appeal, holding that although it was open to him to allow registration of a proprietary club, yet in all the circumstances, in the exercise of his discretion, he would not register this proprietary club.

A preliminary point had been taken before the recorder, and has been taken before this court, that in fact there was no discretion in the recorder, or indeed in the gaming licensing committee, in regard to registering a proprietary club at all. As I have already intimated, the recorder rejected that preliminary point. The point at issue depends on the true construction of para 8 of Sch 7 to the Gaming Act 1968. That is a schedule dealing with what are called Part III registrations pursuant to s 30 of the Act itself. Section 30 provides:

'The provisions of schedule 7 to this Act shall have effect with respect to the registration of clubs and miners' welfare institutes under this Part of this Act in England and Wales . . .'

Schedule 7, by para 8, in dealing with the grounds of refusal to register or to renew registration, provides:

'The licensing authority may refuse to register or to renew the registration of a club under Part III of this Act if it appears to the authority that the club—(a) is not a bona fide members' club, or (b) has less than twenty-five members, or (c) is of a merely temporary character.'

Paragraph 18 deals with the cancellation of a registration already granted, and provides:

'On any such application the licensing authority may cancel the registration of the club or institute under Part III of this Act if they are satisfied . . . (b) that, in the case of a club, the club is not a bona fide members' club, or has less than twenty-five members, or is of a merely temporary character . . .'

Accordingly, so runs the argument, whether one looks at para 8, dealing with the original registration and renewals, or at para 18, dealing with cancellation, it is open to the gaming licensing committee in their discretion to allow registration even if the applicant for registration is not a bona fide members' club, in other words, if it is a proprietary club.

For my part, I approach this question from the general principle underlying the Act on which this legislation is largely based, that proprietary clubs form the subject of a licence, and members' clubs form the subject of registration. One turns then, with that general principle in mind, to look at s 9 in the first instance of the Gaming Act 1968. Section 9 is the first section in Part II, which is headed: 'Gaming on Premises Licensed or Registered under this Part of this Act.' Section 9 provides:

'This Part of this Act applies to all gaming which takes place on premises in respect of which either—(a) a licence under this Act is for the time being in force, or (b) a club or a miners' welfare institute is for the time being registered under this Part of this Act, and which is not gaming by means of any machine to which Part III of this Act applies.'

Accordingly, Part II has no application in this case, but is dealing with gaming generally other than by means of machines, and it is clear, and indeed is conceded, that when one turns to Sch 3, which is the schedule invoked by s 11 (2) in the case of the registration of clubs and miners' welfare institutes, under that Schedule it is quite impossible for the gaming licensing authority to register a proprietary club. Schedule 3 is headed: 'Registration of Members' Clubs . . .' Paragraph 7 (1) of Sch 3 provides:

'The licensing authority shall refuse to register or to renew the registration of a club under Part II of this Act if it appears to the authority that the club—(a) is not a bona fide members' club, or (b) has less than twenty-five members, or (c) is of a merely temporary character.'

Before leaving that schedule, to complete the matter, the later paragraphs make it quite clear, if the heading had not made it clear, that this is dealing with members' clubs only. Accordingly, in the case of an application for the registration of a club or miners' welfare institute under Part II and Sch 3 what the committee have to ask themselves under para 7 is: is this members' club a bona fide members' club? If it is not, it is mandatory on them to refuse registration.

When one turns to Sch 7, which is the schedule applicable to registration under Part III dealing, as s 30 provides, with the registration again of clubs and miners' welfare institutes, in respect of gaming machines the schedule in fact is not headed as is Sch 3 'Registration of Members' Clubs . . .', but is headed: 'Registration under Part III in England and Wales' simpliciter, and the question as I see it is whether under Sch 7, and in particular paras 8 and 18, the gaming authority have to ask

themselves the same question or a different question. Do they have to ask themselves whether the members' club applying is a bona fide members' club, in which case there is not a provision for mandatory refusal of registration but only permissive or does this schedule involve a completely different question, namely: is this club that is applying a bona fide members' club or may it be a proprietary club? and if a proprietary club, there is a distinction.

For my part, I find it very difficult to think that the wording which, apart from the mandatory as opposed to the permissive refusal, is otherwise exactly the same, involves this different conception. It seems to me that under Sch 7, as under Sch 3, one is dealing entirely with members' clubs, and just as under Sch 3 the committee ask themselves: is this members' club bona fide run as a members' club? so under paras 8 and 18 of Sch 7 they ask themselves exactly the same question. The only difference between the two schedules is that in Sch 3 they are bound to refuse registration if it is not a bona fide members' club, whereas under Sch 7 they nevertheless have a discretion even if it is, though a members' club, not bona fide run as such. It seems to me clear that they have in each case to ask themselves the same question.

Finally, approaching it rather differently, supposing Parliament had intended the construction for which the appellants contend, it seems to me that when they reached paras 8 and 18 of Sch 7, they would have used and had to use quite different words to bring in a proprietary club as a club, having regard to the earlier provisions of the Act, particularly Sch 3. After all, 'miners' welfare institutes' must mean the same in both parts of the Act and in both schedules, and one asks oneself why there is any reason to give a different meaning to 'clubs' in those two Parts and those two schedules. I think that on this preliminary point, the recorder came to a wrong conclusion in law, and in the result that he had no jurisdiction to consider whether in this case of admittedly a proprietary club, he should or should not exercise his discretion.

In those circumstances, it is unnecessary to go on and consider whether, assuming that a proprietary club could be a subject of registration under Part III, he had judicially and properly exercised his discretion.

**MELFORD STEVENSON J:** I agree.

**COOKE J:** I agree, and I would only add this. Paragraphs 14, 15, 19 and 25 of Sch 7 to the Gaming Act 1968 all contain references to the chairman or secretary of the club in question. Those references may be compared with similar references to be found in Sch 3 to the Act. It appears to me that those references to the chairman or secretary are appropriate to members' clubs and inappropriate to proprietary clubs, and in my view that reinforces the construction of the Act which LORD PARKER CJ has expounded.

*Appeal dismissed.*

Solicitors: Joynson-Hicks & Co for Gates & Co, Brighton; Sharpe, Pritchard & Co, for T Lavelle, Lewes.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER CJ, MELFORD STEVENSON AND COOKE, JJ)

9th, 19th February 1971

R v GRAVESEND JUSTICES. Ex Parte DOODNEY

*Bastardy—Affiliation order—Enforcement—Mother resident abroad—Putative father unable to apply for variation or revocation of order by reason of mother's residence abroad—Need for mother to submit to jurisdiction in respect of proceedings for variation before being entitled to bring proceedings for enforcement.*

On 14th March, 1968, on the application of Miss E, justices adjudged D to be the putative father of her two children and made an affiliation order against him in respect of each child. Later in that year Miss E went with the two children to Yugoslavia with the intention of permanently residing there. D fell into arrears with his payments and the clerk to the justices on Miss E's request laid a complaint against him. In April, 1969, the justices held that the orders were enforceable against D, but adjourned the complaints sine die on condition that D paid off the arrears at 5s per week. In December, 1969, D applied to the justices for a variation of the orders, but the justices refused the application on the ground that they had no jurisdiction to vary them, Miss E being resident out of the jurisdiction. D applied for an order of certiorari to quash the order for enforcement made in April, 1969, on the ground that the rules of natural justice required that justices should decline to enforce the order unless and until the mother voluntarily submitted to the jurisdiction in the proceedings for variation or revocation.

HELD: it was clear that the general provisions of the Magistrates' Courts Rules, 1968, did not authorise the service of a summons for the variation or revocation of an affiliation order on a person resident outside the jurisdiction; the broad principles of natural justice did not establish the general proposition that whenever the putative father showed a prima facie case for variation or remission, the mother resident abroad should be required to submit to the jurisdiction in proceedings by the putative father as a condition precedent to her own right to bring proceedings for enforcement; the requirements of natural justice should be considered in the light of the facts of each individual case, and in the present case it was impossible to say that the rules of natural justice had been infringed, since the justices had not reached the stage of considering whether the arrears should be remitted wholly or in part; consequentially, certiorari would be refused.

MOTIONS by Henry Walter Sydney Doodney for an order of certiorari to remove into the High Court and quash an order of Gravesend Magistrates' Court for the enforcement of two affiliation orders made against him by magistrates sitting at Bracknell and, alternatively, for an order of mandamus directed to the Gravesend justices to hear and determine complaints by the applicant that the payments under the affiliation orders should be reduced.

N A Medawar for the applicant.

Gordon Slynn as amicus curiae.

Cur adv vult

19th February. **COOKE J** read this judgment of the court: Counsel moves on behalf of the applicant, Henry Doodney, for an order of certiorari to quash an order made on 23rd April 1969 by the justices for the borough of Gravesend relating to the enforcement against the applicant of two affiliation orders made against him in March 1968. By his notice of motion the applicant sought in the alternative an order of mandamus directed to the justices for the borough of Gravesend requiring them to hear and determine complaints made by him seeking a reduction of the sums payable under the two affiliation orders. For reasons which will presently be explained, a motion for the alternative relief by way of mandamus has not been pursued.



The facts are simple. On 14th March 1968 the Berkshire justices sitting at Bracknell, on the application of a Miss Eastty, adjudged the applicant to be the putative father of her two young children, and made an affiliation order against him in respect of each child. In or about June 1968 Miss Eastty left England with the two children and went to Yugoslavia, where the three of them are now residing. The applicant fell into arrears with his payments under the orders, and in due course the clerk to the Bracknell justices, acting at Miss Eastty's request, laid a complaint on which the applicant was brought before the justices at Gravesend on 23rd April 1969. On that date the arrears under the two orders amounted to £38. The applicant was represented by counsel, and while we have not been told in detail what counsel's submissions were, it appears that some reference was made to the difficulty which the applicant might experience if he were to seek to bring before the court an application for the variation of the orders; and that it was suggested that on these grounds the orders ought not to be enforced against him. Despite these submissions the justices held that the orders were enforceable against the applicant and adjourned the complaints sine die on condition that the applicant paid off the arrears at the rate of 5s weekly. Then, on 3rd December 1969, the applicant applied to the respondent justices at Gravesend for the issue of a summons to apply for a variation of the two affiliation orders. That application was refused on the ground that the court had no jurisdiction to vary the orders, Miss Eastty being resident out of the jurisdiction.

It is convenient to begin by considering whether the justices were right in December 1969 in refusing to issue a summons for variation. Section 53 of the Magistrates' Courts Act 1952 provides:

'Where a magistrates' court has made an order for the periodical payment of money the court may, by order on complaint, revoke or vary the order.'

Thus the proceedings for variation or revocation are initiated by complaint, and s 43 of the Act then provides for the issue of a summons requiring the other party to the proceedings (in this case the lady in whose favour the affiliation order was made) to appear before the court to answer the complaint. Then it is necessary to refer to s 47 (3) of the Act, which provides:

'The court shall not begin to hear the complaint in the absence of the defendant... unless [to summarise the matter sufficiently for present purposes] it is proved to the satisfaction of the court... that the summons was served on [the defendant]... or the defendant has appeared on a previous occasion to answer the complaint.'

It seems to follow from this that except in the case, perhaps an unusual one, where a defendant volunteers or has volunteered an appearance without the summons having been served on him, service of the summons on the defendant is a condition precedent to the jurisdiction of the justices to hear the complaint. Service of the summons is governed by r 82 of the Magistrates' Courts Rules 1968. Rule 82 (1) authorises three modes of service—under para (a) by delivering the summons to the person to whom it is directed, under para (b) by leaving it with the same person at his last known or usual place of abode, and under para (c) by sending it to him by post subject to compliance with certain conditions. However, r 82 (5) expressly excludes service by post outside England and Wales.

It seems reasonably clear that the reason why the justices refused to issue a summons on the applicant's complaint of December 1969 was that they took the view that the summons could not be served outside England and Wales. It is possible that some faint argument might have been raised to the effect that since it is only service by post outside England and Wales which is specifically excluded, service

outside England and Wales in the manner authorised by paras (a) and (b) of r 82 (1) is still possible. As to that, it is to be noted that the Royal Commission on Marriage and Divorce, in para 1051 of its report, took the view that if a wife who had obtained a maintenance order in proceedings before justices subsequently left the United Kingdom, the husband would be unable to apply for a variation of the order because it was impossible to serve a summons on the wife. It is also to be observed that s 9 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 contains an express provision, albeit in a declaratory form, to the effect that the jurisdiction to revoke or vary orders under that Act shall be exercisable notwithstanding that the proceedings are brought by or against a person residing outside England. The section goes on to make provision for hearing the complaint in such cases in the absence of the defendant, subject to procedural safeguards designed to secure that the defendant though abroad, has had notice of the complaint having been made. Again one finds in s 3 (1) of the Maintenance Orders Act 1950 an express provision conferring jurisdiction on an English court in certain circumstances to make an affiliation order against a man residing in Scotland or Northern Ireland. Section 3 (3) of the same section confers jurisdiction on the court which has made such an order to revoke or vary the order, notwithstanding that one or other of the parties resides in Scotland or Northern Ireland. It is noteworthy that s 3 treats the matter as a matter of jurisdiction and not merely of procedure. Procedural provision for the service of process are contained separately in s 15 of the Act.

Bearing in mind the express provisions which it has been thought necessary to make in the Acts of 1950 and 1960 for the variation and revocation of affiliation and maintenance orders where one of the parties is resident outside England and Wales, it seems to be clear that the general provisions of the Magistrates' Courts Rules 1968 do not authorise the service of a summons for the variation or revocation of an affiliation order on a person resident outside the jurisdiction.

Counsel for the applicant has himself taken this view, and so has not pursued his motion for relief by way of mandamus. It is from that that his grievance really springs. He says that, if the putative father is unable to bring proceedings for the variation of affiliation order when he has shown a *prima facie* case that a variation would be just, it is quite wrong that the mother should be able to enforce the order. Therefore he says that if, on an application made by or on behalf of the mother to enforce the order, the father shows a *prima facie* case for variation or revocation, the rules of natural justice require that the justices should decline to enforce the order unless and until the mother voluntarily submits to the jurisdiction in proceedings for variation or revocation. That is the basis of his argument that *certiorari* should go to quash the justices' order of April 1969.

Now in this case the Berkshire justices who made the affiliation order directed, pursuant to s 52 (1) and (2) of the Magistrates' Courts Act 1952, that the sums payable by the applicant under the order should be paid to the clerk of the court. The proceedings for the recovery of the arrears were initiated by the clerk at the mother's request, pursuant to s 52 (3). When those proceedings came before them, the respondent justices had a variety of powers at their disposal.

Section 64 (1) of the Magistrates' Courts Act 1952 provides:

'... where default is made in paying a sum adjudged to be paid by ... order of ... a magistrates' court, the court may issue a warrant of distress ...'

Section 64 (2) provides that a warrant of commitment may be issued against a defaulter. However, in the case of arrears under an affiliation order, the powers of the court under s 64 are subject to a variety of restrictions imposed by s 74 of the Act. In particular, the power to issue a warrant of commitment is in effect confined

to certain cases where, after an enquiry as to means, it appears that there has been wilful refusal or culpable neglect on the part of the defaulter. Then by s 65 of the Act the court has power, on such terms and conditions as it thinks just, to postpone the issue of a distress warrant or a warrant of commitment. Then again, and most important, s 76 of the Act confers on the court, in proceedings for the enforcement of an affiliation order, a power to remit the arrears either wholly or in part. The existence of this power removes for all practical purposes the difficulty which arose from the decision in *Grocock v Grocock* (1), in which it was held that though the power to enforce the payment of arrears due under an affiliation order was discretionary, there was no discretion to enforce payment in part only. It is therefore apparent that the court dealing with the mother's application for enforcement has extensive powers to alleviate the hardship to a putative father who says that he wishes to apply for the variation or revocation of the affiliation order but is unable to do so because the mother is residing abroad.

Now counsel for the applicant says that these powers of alleviation are not enough. He says that it is wrong in principle that a putative father who has shown a prima facie case for variation or revocation should be forced to allow arrears to accumulate in order that he may then invoke the court's powers of postponement or remission. This court is invited to lay down, as a broad proposition of natural justice, that whenever the putative father shows a prima facie case for variation or remission, the mother resident abroad should be required to submit to the jurisdiction in proceedings brought by him for that purpose as a condition precedent to her own right to bring proceedings for enforcement. This court would hesitate for long before accepting a proposition of so sweeping and general a character. The requirements of natural justice are best considered in the light of the facts of each individual case. When one looks at the facts of this case, one finds that all that the justices have done on the mother's application for enforcement is to adjourn the proceedings sine die on condition that the putative father pays off the arrears at the rate of 5s weekly. We have no indication of whether any enquiry was made as to the applicant's means or as to the reasons for his failure to pay. We have no indication whether the justices had any evidence before them showing a prima facie case for variation or revocation of the order. What does seem to be quite clear is that the justices have not reached the stage of even considering whether the arrears should be remitted either wholly or in part. In my judgment, it is quite impossible on the material we have before us to say that the rules of natural justice have in any way been infringed. On that short ground this court holds that the motion for certiorari fails, and we dismiss both the motions.

Now that this case has brought to light the difficulties which may face a putative father in obtaining a revocation or variation of an affiliation order where the mother is resident abroad, it may be that those Ministers whose concern it is may wish to consider whether the law should be amended. Meanwhile we are not satisfied that magistrates' courts will find it impossible to do substantial justice in most if not all cases with the numerous if imperfect tools which they already have to hand.

*Motions dismissed.*

Solicitors: *Waterhouse & Co*, for *T G Baynes & Sons*, Dartford; *Treasury Solicitor*.

T.R.F.B.

(1) 83 JP 185; [1920] 1 KB 1.

**COURT OF APPEAL (CRIMINAL DIVISION)**

(FENTON ATKINSON, LJ, LYELL AND MARS-JONES, JJ)

22nd, 23rd February 1971

R v BRINDLEY; R v LONG

*Criminal Law—Impeding apprehension or prosecution—Assisting offender—Ingredients of offence—Need for knowledge of identity of principal offender—Criminal Law Act, 1967, s 4 (1).*

To establish a charge of doing an act to impede the apprehension or prosecution of a person who has committed an arrestable offence, contrary to s 4 (1) of the Criminal Law Act, 1967, it is not necessary to prove that the defendant knew the identity of the principal offender. It is sufficient to prove that a person committed the arrestable offence, that the defendant knew or believed that he had committed it, and that the defendant, without lawful authority or excuse did an act with intent to impede the apprehension or prosecution of the principal offender.

APPLICATIONS by Maureen McKenna Brindley and Frank James Long for leave to appeal against their conviction at the Central Criminal Court of impeding the apprehension of an offender contrary of s 4 (1) of the Criminal Law Act 1967.

P M Herbert for the applicants.

E M Hill for the Crown.

**LYELL J** delivered this judgment of the court: On 22nd October 1970 the applicants Brindley and Long were convicted of doing an act contrary to s 4 (1) of the Criminal Law Act 1967, which provides:

'Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act to impede his apprehension or prosecution shall be guilty of an offence.'

The facts were that on the night of 21st November 1969 two lorries containing loads of brass ingots were stolen from a yard behind the Silverline Garage, the forecourt of which abutted on the A13 road. In the forecourt were petrol pumps and a kiosk for the attendant to shelter in when not serving petrol. The evidence showed that the lorries must have been taken from the yard shortly before 10.00 pm and that they must have been driven away across the forecourt of the garage. It was not in dispute that the applicant Brindley was on duty until 10.30 pm as the petrol pump attendant and that the occupier of the premises next door to the garage had come and told her that strangers had got into his garden and escaped over the wall towards the yard. He offered to investigate the yard to see that everything was all right. She said that she would go. She came back and reported that nothing was amiss.

Two days after the theft she was interviewed by the police and stated that no lorries had left the yard at the material time. She repeated this in evidence but admitted that, if two lorries had crossed the forecourt, she must have seen them. The prosecution's case was that the statement was untrue, that she saw the lorries, knew they were stolen, and made the statement untruthfully without lawful authority or reasonable excuse, with intent to impede the apprehension or prosecution of the thief or thieves. She admitted that she knew one Morphey, who was jointly charged with her with the theft of the lorries. She was, however, acquitted on the charge of theft. The applicant Long also was interviewed by the police and made two statements. In the first he said that while he was at the garage with the applicant Brindley

he had seen no lorries cross the forecourt. Later he made a further statement in which he admitted that he had in fact seen two lorries driven from the yard across the forecourt of the garage at the material time.

Both now apply for leave to appeal against their convictions. The applicant Long puts forward two grounds. First, he says that his second statement, admitting that the earlier one was untrue, was not a voluntary statement but was extracted by the police by threats, and that the learned trial judge erred in law in admitting the statement. At the end of the trial within a trial the learned judge delivered the following judgment:

'... I find that I am satisfied beyond a reasonable doubt that the statements made by Inspector Buckley that he never threatened the [applicant Long] are true, and that the evidence of the [applicant Long] on that matter is false. On the other point, it is perfectly true that the officers say that they tried to persuade [the applicant Long] to make a further statement, and that one of them told him that it would be better to speak the truth. That statement is capable of being an inducement, but the cardinal point on which I have to be satisfied is, "Did that statement operate on the mind of the person to whom it was made, whether he made a statement or not?" I have come to the conclusion that whatever was said to [the applicant Long], he made a statement which was a free and voluntary statement ...'

In the view of this court, the learned judge directed himself correctly as to the question he had to determine as to whether to allow the applicant Long's second statement to be put in evidence. It was for him to decide whether to accept the evidence of the police or the applicant Long as to the alleged threat. He rejected the evidence of the applicant Long and, as the applicant Long said that only the last threat would have induced him to make an untrue confession, there was ample evidence to support the conclusion that the statement was voluntary.

The applicant Long's second ground of appeal and the only ground put forward on behalf of the applicant Brindley was that the learned judge misdirected the jury as to what was required to be proved under s 4 (1) of the Criminal Law Act 1967. First, it was argued that the prosecution had to prove that the accused knew who had committed the principal offence and that he did an act relating to that person. In the view of the court, there is no foundation for that contention. What has to be proved is as follows: first, it has to be proved that a person has committed an arrestable offence; second, that another person knew or believed that the first person had committed it; third, that the second person did an act with intent to impede the apprehension or prosecution of the first person; fourth, that the act was done without lawful authority or reasonable excuse.

The unsoundness of the applicant Long's contention is perhaps best demonstrated by simple example. A smash-and-grab raid is carried out in a quiet street and the person or persons committing it run off. Another person sees it. A police car comes by soon after, the driver sees the broken window, asks the man who has seen the offence committed which way the offenders went and he replies that they went up the street when in fact they went down. That evidence is clearly enough for a jury to convict the bystander of an offence under the section. Anyone who sees a smash-and-grab raid being committed must know that a theft has been committed, and he has seen the person or persons who did it. He sends the police in the wrong direction, so giving the offenders more time to escape. It would then be for the jury to consider whether they are sure that he sent the police the wrong way to make it more difficult to catch the thieves and whether there could be any lawful authority or reasonable excuse for his act. It is frivolous to suggest that in such circumstances the bystander needed to know the identity of the thieves before he could be convicted.



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CRIMINAL LAW - Appeal - Application of proviso to s 2 (1) of the Criminal Appeal Act, 1968. R v Pink	CA 32
CRIMINAL LAW - Blackmail - 'Makes an unwarranted demand' - Demand in letter written and posted in England to person abroad - Theft Act, 1968, s 21 (1). Treacy v Director of Public Prosecutions	HL 112
CRIMINAL LAW - Compensation - Payment by convicted person - Liability to make restitution - Forfeiture Act, 1871, s 4. R. v Ironfield	CA 156
CRIMINAL LAW - Corruption - Act 'in relation to principal's affairs' - Defendant employee of car company - Defendant also performing trade union duties - Act in relation to trade union affairs also act in relation to company's affairs - Prevention of Corruption Act, 1906, s 1 (1). Morgan v Director of Public Prosecutions	QBD 86
CRIMINAL LAW - Costs - Payment by convicted person - Order not to be made unless defendant has private capital. R v Gaston	CA 157 ftnt.
CRIMINAL LAW - Dangerous drug - Possession - Evidence - Minute quantity of drug found on analysis. R v Marriott	CA 165
CRIMINAL LAW - Evidence - Confession - Defendant informed that third person has accused him of offence - No explanation or disclaimer. Hall v Reginam	PC 141
CRIMINAL LAW - Evidence - Cross-examination of co-prisoner on character - Evidence given by co-prisoner against prisoner - Charged 'with the same offence' - 'Same offence' - Possession by two prisoners of forged notes not joint but immediately successive - Criminal Evidence Act, 1898, s 1 (f), proviso (iii). R v Russell	CA 78
CRIMINAL LAW - Evidence - Electronic tape recording - Proof by prosecution of originality. R v Stevenson	Assizes 174
CRIMINAL LAW - Evidence - Witness - Right to refresh memory - Prosecution witness - Previous statement to police - Statement not contemporaneous with but soon after events in question - Great delay before trial - Statement read by witness soon before trial - Course suggested by prosecution - Propriety. R v Richardson	CA 371
CRIMINAL LAW - Forcible detainer - Peaceable entry - Property entered fortified to defeat attempt at eviction - Trial on indictment - Forcible Entry Act, 1429. R v Mountford	CA 250
CRIMINAL LAW - Forgery - Acknowledging a recognisance in the name of another - Recognisance not demanded by person lawfully authorised - Forgery Act, 1861, s 34. R v McKenzie	Assizes 26



CRIMINAL LAW - Impeding apprehension or prosecution - Assisting offender - Ingredients of offence - Need for knowledge of identity of principal offender - Criminal Law Act, 1967, s 4 (1).		
R v Brindley; R v Long	CA	357
CRIMINAL LAW - Jurisdiction - Offences initiated abroad. See Treacy v Director of Public Prosecutions, p. 112, and R v Baxter, p. 345.		
CRIMINAL LAW - Obtaining pecuniary advantage by deception - Betting transaction - Operative inducement - Theft Act, 1968, s 16 (2) (a) (c).		
R v Aston, R v Hadley	CA	89
CRIMINAL LAW - Obtaining property by deception - Attempt - Fraudulent claim posted abroad - Letter received by addressee in England - Theft Act 1968, s 15 (1).		
R v Baxter	CA	345
CRIMINAL LAW - Road Traffic offences. See ROAD TRAFFIC infra.		
CRIMINAL LAW - Sentence - Suspension - Act providing minimum sentences for specified offences - Power of court to suspend sentence - Criminal Justice (Temporary Provisions) (Northern Ireland) Act, 1970, s 1 - Treatment of Offenders (Northern Ireland) Act, 1968, s 18 (1).		
Kennedy v Spratt	HL	203
CRIMINAL LAW - Theft - Ingredients of offence - Consent of owner obtained by dishonesty - Facts proved justifying conviction of obtaining property by deception - No bar to conviction for theft - Theft Act, 1968, s 1 (1), s. 2 (1) (b), s 15 (1).		
R v Lawrence	CA	144
CRIMINAL LAW - Theft - Ingredients of offence - Intention of permanently depriving another of property - Direction to jury - Theft Act, 1968, s 1 (1), s 6.		
R v Warner	CA	199
CRIMINAL LAW - Venue - Indictable offence - Place where defendant 'in custody' - 'Custody' - Criminal Justice Act, 1925, s 11 (1).		
R v Kulynycz	CA	82
CUSTOMS AND EXCISE - Being knowingly concerned in fraudulent evasion of restriction - Importation of cannabis - Offence and penalty created by Customs and Excise Act, 1952 - Restriction on importation imposed by Dangerous Drugs Act, 1965 - Proceedings on indictment under Customs and Excise Act, 1952, s 304 - Need of leave of Attorney-General or Director of Public Prosecutions under s 20 of Dangerous Drugs Act, 1965		
R v Williams	CA	359
EXTRADITION - Ireland - Order by magistrate in England - Duty to inquire into merits of charges - Prosecution for political offence if order made - Backing of Warrants (Republic of Ireland) Act, 1965, s 2 (1) (2) (b).		
Keane v Governor of Brixton Prison	HL	240
GAMING - Betting - Office - Advertisement - 'Premises giving access to a licensed betting office' - Display of sign on outside wall - Sign showing company's registered name and containing words 'turf accountants' - Indication that premises were licensed betting office - Betting (Licensed Offices) Regulations, 1960, reg 2 - Betting, Gaming and Lotteries Act, 1963, s 10 (5) (a), (b).		
Maurice Binks (Turf Accountants) Ltd v Huss	QBD	148
GAMING - Forecast of future event - Photograph of players taken during football match - Ball not in photograph - Competitors required to mark most likely position of ball - Position later chosen by panel of judges - Success of competitors marking positions closest to that chosen by panel - Betting, Gaming and Lotteries Act, 1963, s 47 (a) (i).		
Ladbroke (Football) Ltd v Perrett	QBD	181
GAMING - Pool betting - Lottery - 'Competition for prizes for making forecasts as to sporting events' - Need of skill in making forecasts - Lottery - Betting, Gaming and Lotteries Act, 1964, s 41, Sched 2, para 13 (a).		
Singette Ltd and Others v Martin	HL	157
GAMING - Registration - 'Club' - Refusal to register or renew registration - Members' clubs only included - Registration not applicable to proprietary clubs - Gaming Act, 1968, Sch 7, para 8.		
Tehrani v Rostrom	QBD	350
HIGHWAY - Gipsy - Encamping without lawful authority or excuse - Meaning of 'encamp' - Highways Act, 1959, s 127 (c).		
Smith v Wood	QBD	257
HIGHWAY - Obstruction - Stall for sale of goods - Implied licence by local authority.		
London Borough of Redbridge v Jaques	QBD	98
HOUSING - Compulsory purchase - Clearance area - Adjoining land - Need to show purchase necessary for satisfactory development or use of cleared area - 'Cleared area' - Housing Act, 1957, s 43 (2).		
Coleen Properties Ltd v Minister of Housing and Local Government	CA	226
HOUSING - Multiple occupation of premises - Requirements to execute works - Notice - Wilful failure to comply - Defence - Bona fide belief that works better performed later - Housing Act, 1961, s 15 (1) (3) - Housing Act, 1964, s 64 (1).		
Honig v London Borough of Islington	QBD	233
HUSBAND AND WIFE - Maintenance of wife - High Court order registered in magistrates' court - Application for variation - Substantial expenditure of time - Remission to High Court - Maintenance Orders Act, 1958, s 4 (4).		
Gsell v Gsell	PDA	163

Finally, it is said that the learned judge should have directed the jury to consider whether the accused may have had some other intent than that of impeding arrest or prosecution. In the judgment of this Court, there was no duty to do so. His duty was to direct the jury as to the intent which had to be proved and direct them that they had to be sure it had been proved unless some other intent was suggested by the defendant. None was suggested here and there was a proper direction as to what the prosecution had to do. For these reasons the applications are refused.

*Applications refused.*

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.

T.R.F.B.

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### COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, CJ, WIDGERY, LJ, AND COOKE, J)

1st March 1971

R v WILLIAMS

*Customs and Excise—Being knowingly concerned in fraudulent evasion of restriction—Importation of cannabis—Offence and penalty created by Customs and Excise Act, 1952—Restriction on importation imposed by Dangerous Drugs Act, 1965—Proceedings on indictment under Customs and Excise Act, 1952, s 304—Need of leave of Attorney-General or Director of Public Prosecutions under s 20 of Dangerous Drugs Act, 1965.*

Where proceedings are taken by way of indictment under s 304 of the Customs and Excise Act, 1952, against a defendant charged with being knowingly concerned in the fraudulent evasion of the restriction on the importation of drugs imposed by s 2 of the Dangerous Drugs Act, 1965, the leave of the Attorney-General or the Director of Public Prosecutions before proceedings are taken is not necessary under s 20 (1) of the Dangerous Drugs Act, 1965, since the Act of 1952 creates the offence and the penalty and the Act of 1965 only imposes the restriction.

APPEAL by Harold Leon Williams against his conviction at North East London Quarter Sessions, and the sentence of two years' imprisonment then imposed on him, for being knowingly concerned in a fraudulent evasion of the restriction on the importation of cannabis imposed by the Dangerous Drugs Act 1965, contrary to the Customs and Excise Act 1952, s 304.

F P Shier for the appellant.

A M Hill for the Crown.

LORD PARKER CJ delivered this judgment of the court: In September 1970 at North East London Quarter Sessions the appellant pleaded guilty to an offence contrary to s 304 of the Customs and Excise Act 1952, 'Being knowingly concerned in a fraudulent evasion of the restriction upon the importation of cannabis imposed by the Dangerous Drugs Act 1965'. That plea of guilty was only entered after the chairman had overruled a submission of law, namely, that on the facts, which were really admitted, there was no offence. The appellant was sentenced to two years' imprisonment and he now appeals against his conviction on a point of law and applies for leave to appeal against his sentence.

The admitted facts here were that shortly after Christmas 1969 the appellant met an Indian at a gaming club in Earls Court, an Indian going by the name of Habei Singh. That Indian asked the appellant if he had contacts for selling 'stuff', clearly thereby referring to cannabis. The appellant at first put him off, but they met again a week later when another Indian, Abbas Singh, was present. Habei said that he was going back to India and could send on 'samples'. He asked the appellant for his address. The appellant then gave the address of the house of a niece at Northolt and the name 'Harry Wragg', a name by which he was wont to go. The Indian said that the first sample would be small; that he was to get rid of it through his contacts; and that Abbas would meet him later. It was arranged that the Indian would write a letter before sending the samples. The appellant thereupon told the niece and a Mr Willoughby with whom she lived that a letter would shortly be arriving for him at that address in the name of Harry Wragg. What happened thereafter was that Mr Willoughby did find an air letter addressed to Wragg, and, not realising it was the appellant's pseudonym, he opened and read it and, having read it, he came to the conclusion that he would not tell the appellant about it in the hope that the appellant would stop using his address for such a purpose. Accordingly, when the appellant called later he was told that no letter had arrived. In due course, on 29th April, Customs officers examined a parcel addressed to 'H Wragg' at the niece's address at Northolt, which apparently had come from Bombay. In it were three tins containing quantities of cannabis resin. Thereupon the Customs officers reconstituted the parcel, substituting clay for the resin, and delivered it at the niece's address. Two Customs officers kept watch on the house and called on Miss Reid and Mr Willoughby, and were told the parcel had been taken in addressed to H Wragg, which they knew was the appellant's pseudonym.

The submission was made that on those facts the offence had not been made out. The same point has been taken in this court, and the way it is put, as the court understands it, is that an agreement to sell cannabis after it had been imported into this country was not a sufficiently close act to the actual importation to constitute the appellant's being concerned in a fraudulent evasion of the restriction. The court is, with all respect to counsel for the appellant, unable to understand his argument. It may well be that this was a joint enterprise to import, in which case there could be no doubt about it, but even if it is looked on as an agreement on the one side to import, and on the other to sell, it seems to this court that undoubtedly what he was doing was sufficiently close to make him knowingly concerned in the importation.

The other point that is raised is a matter of procedure. It is said that by reason of s 20 of the Dangerous Drugs Act 1965 the leave of the Attorney-General or Director of Public Prosecutions, neither of which was obtained, was necessary before proceeding against the appellant by way of indictment. The argument runs that the prohibition here was a prohibition laid down by s 2 of that Act, which provides that it shall not be lawful for a person to import into the United Kingdom a drug to which this part of this Act applies except under a licence granted by the Secretary of State, and one of the drugs to which this part of this Act applies is cannabis. Accordingly it is said that though in form laid against s 304 of the Customs and Excise Act 1952, that must be read with the Dangerous Drugs Act 1965, and that as no leave had been obtained from the Attorney-General or the Director of Public Prosecutions, the proceedings were a nullity. The court is quite unable to accept that argument. The offence here is an offence against s 304 of the Customs and Excise Act 1952; that provides, so far as it is material:

'Without prejudice to any other provision of this Act, if any person . . . (b) is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such

prohibition or restriction as aforesaid or of any provision of this Act applicable to those goods, he may be detained and, save where, in the case of an offence in connection with a prohibition or restriction, a penalty is expressly provided for that offence by the enactment or other instrument imposing the prohibition or restriction, shall be liable to a penalty of three times the value of the goods or one hundred pounds, whichever is the greater, or to imprisonment for a term not exceeding two years, or to both.'

It is quite clear, therefore, that that section is providing an offence and a penalty, and the words 'any such prohibition or restriction as aforesaid' carry one back to para (a) where the prohibition or restriction is one for the time being in force under or by virtue of any enactment with respect thereto. In other words s 304 of the Customs and Excise Act 1952 creates the offence and the penalty, and one only goes to the Dangerous Drugs Act 1965 in order to see what the prohibition is that is imposed in s 2. Further, on the wording of s 20 of the Dangerous Drugs Act 1965 itself, the consent of the Attorney-General is only needed in the case of proceedings by indictment for an offence against that Act, and s 2 to which I have already referred does not create an offence in itself. Accordingly, in the judgment of the court there is nothing in this procedural point and in the result the appeal fails and must be dismissed.

So far as sentence is concerned, the court can see no ground whatever to interfere. This is a man of 43 years of age who comes from Jamaica. He has now been guilty of three offences of being found in possession of drugs, and on this occasion the appellant clearly contemplated that on importation these drugs would be used not for personal consumption but for selling to what were referred to as his contacts. Accordingly the application for leave to appeal against sentence is refused.

*Appeal dismissed.*

Solicitors: *Registrar of Criminal Appeals; Solicitor, Customs and Excise.*

T.R.F.B.

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QUEEN'S BENCH DIVISION

(JOHN STEPHENSON, J)

16th November 1970

GRIMLEY AND ANOTHER v MINISTER OF HOUSING AND LOCAL  
GOVERNMENT AND ANOTHER

*Compulsory Purchase—Order—Purchase of one of two semi-detached houses—Easement of support for other house.*

A housing authority made a compulsory purchase order, which was confirmed by the Minister, in respect of one of a pair of semi-detached houses with the intention of demolishing it to provide a means of access to proposed warehouse development. The owners of the other house sought to have the order quashed on the ground that the demolition of the house comprised in the order would deprive them of the right of support by that house which they had for their property.

HELD: the easement for support possessed by the owners of the other house was not land or annexed to land which was comprised in the compulsory purchaser order; it was a right over land which was comprised in the order; and, no order would be made to quash the purchase order.

MOTION by the first applicant, Richard Harold Grimley, and the second applicants, Thomas Porter & Sons Ltd, to quash the City of Liverpool (371 Park Road) Compulsory Purchase Order 1968 made by the Liverpool Corporation and confirmed by the Minister of Housing and Local Government.

R J H Collinson for the applicants.

Gordon Slynn for the Minister.

The corporation did not appear.

**JOHN STEPHENSON J:** Counsel moves on behalf of the two applicants, Richard Harold Grimley and Thomas Porter & Sons Ltd, who say that they are aggrieved by the making of the City of Liverpool (371 Park Road) Compulsory Purchase Order 1968, for an order that the compulsory purchase order be quashed. He moves first against the second of the two respondents, the Liverpool Corp'n, who made that compulsory purchase order on 26th September 1968, and secondly against the Minister of Housing and Local Government, the first respondent, who confirmed that order on 31st December 1969. The grounds on which he moves are, first, that the second applicants were and are owners of the land comprised in the order, within the meaning of s 8 (1) of the Acquisition of Land (Authorisation Procedure) Act 1946, as affected by s 3 (2) and (5) of the Liverpool Corporation (General Powers) Act 1966, in that they are or were entitled to an easement or right of support therefrom. Secondly, that the corporation, as acquiring authority, failed, in contravention of their obligation under para 3 (1) (b) of Sch 1 to the Acquisition of Land (Authorisation Procedure) Act 1946, to serve the second applicants with notice of the order, as therein described. Thirdly, that the corporation failed as aforesaid, notwithstanding that their failure so to do was drawn to their attention on a number of occasions. Fourthly, that the Minister, as confirming authority, misdirected himself in law in holding that no such notice as aforesaid on the second applicants was necessary, and/or that he in confirming the order acted ultra vires the Act of 1946.

It is said by the parties before me that it would have been conceded by the corporation, had it appeared, that it did not in fact serve on the second applicants notice of this compulsory purchase order, and it would also, I think, have to concede, as has been proved before me, that the second applicants did all that they could to get the

corporation to serve notice of the order on themselves. By a letter dated 23rd November 1968, Messrs Layton, the solicitors acting for both the applicants, wrote to the Minister referring to the fact that they had given him notice on 1st November that the second applicants objected to the making and confirming of this compulsory purchase order and, after withdrawing one ground of their objection, adding two more, the second of which was that:

'[the applicants have] not been served with a copy of the order notwithstanding that [they are] an owner of land comprised in the order within the meaning of schedule 1 to the Acquisition of Land (Authorisation Procedure) Act 1946, as [they are] the owner of an easement of support over 371 Park Road by reason of [their] ownership of 373 Park Road.'

The corporation has not explained why it had not, *ex abundanti cautela*, served a notice on these objecting owners of adjacent property, an adjacent property which may well be seriously and injuriously affected by the enforcement of the compulsory purchase order which the Minister has confirmed. But however that may be, what this court has to do is to decide whether there is substance in the grounds—really, one ground—put forward on behalf of both applicants, and very ably put forward by counsel for the applicants—that the second applicants were owners of the land comprised in the order and, as such, ought to have been served with notice.

The compulsory purchase order provides:

'Subject to the provisions of this order the [corporation is], under s 5 of the Liverpool Corporation (General Powers) Act, 1966, hereby authorised to purchase compulsorily for the purpose of providing a means of access to proposed warehouse development the land described in the schedule hereto . . .'

The land described in the schedule is this: 'Vacant dwellinghouse and gardens known as No. 371 Park Road comprising an area of 1,045 sq. yds. approximately.' Its owners or reputed owners are stated in the schedule to be the first applicant, and that order was confirmed by the Minister after an inquiry had been held on 29th May 1969 by an inspector who reported on the objections which were made to the order, both by the first applicant and by the second applicants. Both—although only the first applicant was served with the notice of the order—made objections, attended the inquiry and were represented by the same solicitors, Messrs Layton, of whom Mr Hunt who has sworn an affidavit in support of this application was a partner, and he was also a director of the second applicants.

In that report, the inspector sets out that:

'The order relates to the dwellinghouse and land, 371 Park Road, Liverpool required to provide a means of access to land proposed to be developed for warehouse purposes.'

He recites that objections were received, one from the owners of property adjoining 371 Park Road (the second applicants), the other from the owner of 371 Park Road (the first applicant), and that they were both represented at the inquiry.

'The grounds of objection were:—(i) By the [second applicants], that demolition of the dwellinghouse would adversely affect the structural stability of their adjoining property, that the proposed use of the land would adversely affect the amenities of their neighbouring property and undertaking business, that a means of access could be provided over other land, and that they had not been served with a copy of the order';



whereas the ground of the first applicant, the owner, is simply 'that he intends to reside in the dwellinghouse himself'.

It was, as shown in the report, part of the corporation's case that demolition of the house on the order site would not affect the structural stability of the adjoining property, 373 Park Road, owned by the second applicants. After demolition, the exposed flank wall of this building would be made good and weathertight. It was also stated on its behalf that a notice was given to the first applicant, and that no copy had been served on the second applicants. 'Apparently', it contended

'there is no express mention in their title of a right of support from the order site and it does not necessarily follow that they have any legal interest in it.'

The case for the applicants is summarised as follows:

'Objector No. 1. [The second applicants]

'27. These objectors own No. 373, which is used as two flats and a doctor's surgery, Nos. 375 and 377 which are each in three flats, a motor repair and motor body repair and manufacturing workshop behind Nos. 373 and 375 which is let to C. E. Wilcox Limited and has access between these two houses, and buildings covering the whole of the rear and side of No. 377 used for the undertaking business, including six chapels of repose, offices and vehicle garage and let for manufacturing coffins and for armature winding.

'28. The demolition of the house on the order site, which is one of a pair with No. 373, both very old houses, could affect the stability of No. 373. Although the opinion of the corporation is that no harm would be done, the effect cannot be adequately foretold.

'29. The residential amenities, and the amenities of the doctor's surgery, in the adjoining houses would suffer by the use of the order site as an access with the consequent traffic noise. The company has carried on its undertaking business at the premises since the 1800's and the peace and quietness of the chapels of repose, and of the visitors thereto, would likewise be disturbed and annoyance created.

'30. It is already difficult for the large hearses and limousines garaged at the premises, from where many funeral cortèges start, to turn into Park Road because of the traffic, and the additional traffic attracted by an access over the order site would make conditions much worse. Redevelopment of their premises would be inhibited by an access there.

'31. The 1946 Act requires that before an order is submitted the acquiring authority shall serve a copy of it on every owner, lessee or occupier of land included in the order. In the 1966 Act land is defined as including any easement in, to, under or over land. The order site house and No. 373 are semi-detached houses; the objectors own No. 373 and as such are owners of an easement of support by the order site house. In the absence of any express grant of right of support it has been acquired by prescription. Being the owners of this right of support they should have been served with a copy of the order and as they were not, the order cannot be confirmed because the statutory conditions have not been carried out.

'Objector No. 2. [The first applicant]

'32. [The first applicant] has been the owner of the order site house for many years and it has been vacant for about eight years having been previously occupied as flats. He also owns and occupies No. 6 The Elms and this will be acquired and demolished by the council to make way for the new road. Therefore the family wish to take up occupation of the order site house.

'33. A contractor has quoted a price of £250 mainly for repairing the roof and [the first applicant] will carry out other necessary repairs himself in order to make the house habitable, but does not know what this will cost. The whole family will then occupy the order site house.

*'Both objectors*

'34. The order is unnecessary because access could be obtained elsewhere. The [corporation] have made a compulsory purchase order on the vacant houses Nos. 2 to 10 Peel Street, [it] will be making a compulsory purchase order on the houses behind these along The Elms, and these could be demolished to provide an access. There is adequate frontage, Peel Street is of adequate width and it could be widened if required when the [corporation] redevelop on the opposite side.

'35. The [corporation] has not approached any other owners along Park Road as [it] should have done if an access to that road was so necessary. No. 369 belongs to one of the firms who are to redevelop the back land and it would be better to use that property than the order site.'

Among the inspector's findings of fact are:

'On one side [the order site] adjoins a house (the adjoining semi-detached No. 373) which is used as two flats and a doctor's surgery with a vehicle body repair and manufacturing works behind it and on the other side a vehicle body repair works.'

He sets out the relevant contention of the second applicants that:

'They claim that there is a right of support for No. 373 from the order site house and accordingly they should have been served with a copy of the order, although they have not received one.'

His conclusions end in this way:

'It is not unusual for one of a pair of semi-detached houses to be demolished and providing the order site house was taken down in a proper manner and No. 373 made good structurally, its stability would not necessarily be impaired. In any case, the [corporation] would probably be liable for any damage that accrued. The adjoining owners' suggestion that the order has not been properly served is a matter for legal determination. (4) My view on the location of the access and accordingly on the objectors' contention that it could be located elsewhere, are as in paragraph 38 (1). Summarising, on the assumption that the order is valid, none of the objections made carries sufficient weight to warrant rejecting it.'

I have not referred to para 38 (1), and there is no need to do so. The final recommendation is:

'On the assumption that the order is valid and that the proposed departure from the development site is approved, I recommend that the City of Liverpool (371 Park Road) Compulsory Purchase Order 1968 be confirmed.'

And it was confirmed by the Minister in a letter dated 31st December 1969, which recites the making of the order under s 5 of the Act of 1966 and that it relates to 371 Park Road. In para 7 of his letter of decision the Minister states:

'The Minister has considered the question whether the order has been properly served. He is advised that even if the alleged easement of support does exist it does not bring the owner of 373 Park Road within the definition of owner

given in section 8 (1) of the Acquisition of Land (Authorisation Procedure) Act 1946, and therefore no notice was required to be served under paragraph 3 (1) (b) of the first schedule to the Act on the owner of that property. Accordingly the Minister is satisfied that the order was properly served.'

That is the first question that I have to decide. In substance, I think that the only question is: Were the second applicants the owners of land within the relevant statutory provisions, and therefore entitled to be served? It is not suggested that they qualified in any other way for service of notice of this order—they qualify as owners of land, if at all. I first have to look at the Acquisition of Land (Authorisation Procedure) Act 1946. That Act lays down the procedure which is to be carried out for authorising compulsory purchase, and s 1 (1) provides:

'The authorisation of any compulsory purchase of land—(a) by a local authority where, apart from this Act, power to authorise the authority to purchase land compulsorily is conferred by or under any enactment contained in a public general Act and in force immediately before the commencement of this Act, other than any enactment specified in subsection (4) of this section . . . shall, subject to the provisions of this and the next following section, be conferred by an order (in this Act referred to as a "compulsory purchase order") in accordance with the provisions of the first schedule to this Act . . .'

Schedule 1 to the Act provides:

'1. A compulsory purchase order authorising a compulsory purchase by a local authority (hereafter in this schedule referred to as the "acquiring authority") in a case falling within subsection (1) of section one of this Act shall be made by the local authority and submitted to and confirmed by the authority having power under the enactment in question to authorise the purchase (hereafter in this schedule referred to as the "confirming authority") in accordance with the following provisions of this Schedule.

'2. The compulsory purchase order shall be in the prescribed form and shall refer by reference to a map the land to which it applies.

This order was in the prescribed form.

'3.—(1) Before submitting the order to the confirming authority the acquiring authority [i.e. the corporation] shall—(a) in two successive weeks publish in one or more local newspapers circulating in the locality in which the land comprised in the order is situated a notice in the prescribed form stating that the order has been made and is about to be submitted for confirmation and the purpose for which the land is required, describing the land, naming a place within the locality where a copy of the order and the map referred to therein may be inspected, and specifying the time (not being less than twenty-one days from the first publication of the notice) within which and the manner in which objections to the order can be made; (b) except in so far as the confirming authority [the Minister] directs that this provision shall not have effect in any particular case, serve on every owner, lessee and occupier (except tenants for a month or any period less than a month) of any land comprised in the order a notice in the prescribed form stating the effect of the order and that it is about to be submitted for confirmation, and specifying the time (not being less than twenty-one days from the service of the notice) within which and the manner in which objections thereto can be made . . .'

Part IV of Sch 1 is also relevant, but I shall not read that at this stage. I turn to s 8 (1) of the Act, which first of all defines 'land' and 'owner':

"land", in relation to compulsory purchase under any enactment, includes anything falling within any definition of the expression in that enactment; . . .

"owner" in relation to any land, means a person, other than a mortgagee not in possession, who is for the time being entitled to dispose of the fee simple of the land whether in possession or in reversion, and includes also a person holding or entitled to the rents and profits of the land . . .

Each of these definitions is qualified by the opening words of the subsection: 'In this Act, except where the context otherwise requires, the following expressions have the meanings hereby assigned to them . . .' That is to say, that definition of land must be considered in the context of the Liverpool Corporation (General Powers) Act 1966, and of the definition contained in that Act of this same word 'land'. There is no definition in the 1966 Act of the word 'owner', but by s 3 of the Act, it is provided:

'(2) In this Act, unless the subject or context otherwise requires . . . "land" includes water and any interest in land or water and any easement or right in, to, under or over land or water.

'(3) Except where the context otherwise requires, any reference in this Act to any enactment shall be construed as a reference to that enactment as applied, extended, amended or varied by, or by virtue of, any subsequent enactment including this Act.'

Section 5 of the 1966 Act gives the corporation power to acquire land for development and provides:

'(1) The corporation may purchase by agreement and (in any case where the corporation are unable to acquire land by agreement on terms which in their opinion are reasonable) may be authorised by means of an order made by the corporation and submitted to the Minister and confirmed by him to purchase compulsorily land in the city for the purpose of—(a) development by the erection of any building or the construction or carrying out of works on land for the benefit or improvement of the city; or (b) facilitating the provision of premises for occupation by any undertaking carried on or to be carried on there or for otherwise meeting the requirements of such undertaking (including the requirements arising from the needs of persons employed or to be employed therein.)

'(2) The Acquisition of Land (Authorisation Procedure) Act, 1946, shall apply as if this section were an enactment contained in a public general Act and in force immediately before the commencement of that Act.'

Counsel for the applicants argues that the second applicants were the owners of land as defined in s 3 of the 1966 Act, because they were the owners of that interest in land which is called an easement, namely, the right of support, the right to be supported, by a building on that land, 371 Park Road, which was the subject of the compulsory purchase order. That right of the owner of no 373, as the dominant tenement, over no 371, as the servient tenement, was, he says, expressly included by the definition in the 1966 Act, and it was the subject of the compulsory purchase order of 1968. One cannot, he says, purchase a vacant dwelling-house, if it is semi-detached, without purchasing this mutual easement. That means, certainly where one has an easement of support (whatever may be the case with any other kind of easement—a right of way, a right of water, or a right of air or light), there one has mutual rights of support, and if one purchases one of the two houses enjoying those mutual rights, one purchases, as I understand his argument, not only no 371—the house that is the subject of the purchase order—in express terms, and the rights appertaining to that building and land which has its right to be supported by no 373,

but one purchases also no 373's right to be supported by no 371. He could cite no authority for that proposition, but he referred me to a decision of the Court of Appeal in *Bond v Norman, Bond v Nottingham Corp'n* (1). That was a case under the Housing Act 1936, in which the Nottingham Corp'n had proceeded by way of a clearance order to demolish a semi-detached house, and Mr Bond had objected on the ground that he had a right to be supported by the house which was to be demolished under the authority's order. It was there pointed out that the Nottingham Corp'n could have gone under the acquisition of land procedure laid down by the Housing Act 1936, in which case they would have had to pay compensation for extinguishing Mr Bond's right of support, and it was held that they could not avoid paying compensation, and could not take away Mr Bond's right of support without paying him compensation, by going for a clearance order, on the general rule of construction not to construe an Act of Parliament as interfering with a person's rights without compensation unless obliged so to do. So there the decision was, though very different and on different statutory provisions from those on which counsel for the applicants relies, that a local authority's order involving the demolition of a semi-detached house should not be allowed to extinguish the right of support enjoyed by the owner of the other semi-detached house, and that decision may be a reason for the introduction into the 1966 Act of its definition of land as any interest in land or water, and any easement or right in or to, under or over, land or water.

I have been referred by counsel for the Minister to three statutory provisions, one or more of which may provide the second applicants with a right to compensation from the corporation if the corporation proceeded to demolish no 371 if it has compulsorily purchased it and demolished it without providing adequate structural support for the second applicants' no 373. They are s 81 of the Town and Country Planning Act 1962, s 68 of the Lands Clauses Consolidation Act 1845, which is incorporated by s 4 of the 1966 Act, and s 10 of the Compulsory Purchase Act 1965.

The court would naturally lean against any construction of the 1946 and 1966 Acts which would give to the corporation a right to ruin the stability of the second applicants' house, no 373, without the payment of compensation, and I am relieved to think that if I reject the second applicants' motion, I shall not be leaving them without a remedy, should the corporation extinguish their right of support. I am satisfied that at least one of those provisions would prevent that result, but, assuming as I do that no 373 has this right to support from no 371, I none the less hold that counsel for the Minister has provided a short, correct answer to this application. He points out that it is not easy to apply the words of the definition of 'owner' in s 8 (1) of the 1946 Act to the owners of an easement. An easement is a right annexed to land to utilise other land of different ownership in a particular manner: that is a definition which I take in shortened form from 12 Halsbury's Laws (3rd Edn) p 519, para 1123. The Law of Property Act 1925 provides by s 1:

'(1) The only estates in land which are capable of subsisting or of being conveyed or created at law are—(a) An estate in fee simple absolute in possession; (b) A term of years absolute.

'(2) The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are—(a) An easement, right or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute . . .'

It would therefore appear that an owner of land has an estate in fee simple in the land of which he is entitled to dispose, but the owner of an easement has an interest equivalent to such an estate in fee simple. I think counsel for the Minister would

(1) 104 JP 219; [1940] 2 All ER 12; [1940] Ch 429.

be reluctant to argue that that by itself would be enough to prevent me from applying the definition to the owner of an easement. But counsel goes on to submit that the real difficulty in the applicants' way is that the second applicants' easement for support is not land, or annexed to land, which is comprised in the compulsory purchase order—it is a right over land which is comprised in the order. But whereas the first applicant's right over the second applicants' land is a right to support from no 373, and as such is land comprised in the order, as it would be comprised in a conveyance to either the corporation or a private individual, the second applicants' right to be supported by no 371 is not land comprised in the purchase order at all.

The matter is, I think, even clearer, if what is to be considered is an easement of a different character, like a right of way or water. Then it seems to me, as counsel for the applicants very nearly conceded, that rights annexed to no 371 would be the subject of the purchase order, but rights annexed to no 373 over no 371 and its land could not be. Does the nature of the right of support make a difference? I do not think that it does. It may create a greater hardship for the owner of adjoining property—the owner of the other semi-detached part of the composite whole, but it does not affect the subject-matter of the compulsory purchase order. That is accurately and completely set out in the schedule to the order, and cannot, in my view, be stretched to include not only rights annexed to the land described in the schedule, but rights annexed to other adjoining land over the land set out in the schedule. It is only that which belongs to no 371 which is being purchased; nothing which belongs to no 373 is being purchased. The fact that it is difficult to disentangle the right of support belonging to no 371 from the right of support belonging to no 373, and that the purchase of one may lead to the extinction of the other, does not seem to me to bring the other within the order, or within the definition of 'land' in the 1966 Act. I cannot find in the definition of land in that Act any intention to alter the general law. It makes sense, I think, if one considers it as relating to land and any easement or right which is annexed to that land. That, as it seems to me, was inserted, even if not strictly necessary, to make clear that any rights, interests, and easements which might exist in a city like Liverpool would be purchased by the corporation with the land to which they were annexed. Why it was necessary to make that clear, I do not know; but I think that the definition does make it clear, and I cannot find in the qualifying words 'unless the subject or context otherwise requires', or in any of the provisions of that Act or the 1946 Act to which counsel for the applicants has referred me, anything that would rule out the view which I have formed. I do not think that the context or subject does require me to suppose that land includes rights over the same land, any more than it requires me to hold that 'owner of land' means 'owner of the rights over that land'.

I therefore hold that the second applicants were not an owner of land comprised in the purchase order, and therefore not entitled or required to be served. This application therefore fails.

Counsel for the Minister took other points in case I should be against him on his first point, and he also took a point in relation to the first matter with which counsel for the applicants thought I must deal. His next point was that if, contrary to his submission, the second applicants were owners of land, the corporation's failure to serve them was a failure to comply with the requirements of the Act, and did not per se affect the corporation's power to make a compulsory purchase order, or the Minister's power to confirm it. He referred in support of that submission to para 15 in Part IV of Sch 1 to the 1946 Act, where it certainly appears that a distinction is drawn between failure to comply with a requirement of the Act, or regulations made under it, and the absence of power to grant the compulsory purchase order. Paragraph 15 (1) provides:



'If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in subsection (1) of section one of this Act, or if any person aggrieved by a compulsory purchase order or a certificate under Part III of this schedule desires to question the validity thereof on the ground that any requirement of this Act or of any regulation made thereunder has not been complied with in relation to the order or certificate, he may, within six weeks from the date on which notice of the confirmation or making of the order or of the giving of the certificate is first published in accordance with the provisions of this schedule in that behalf, make an application to the High Court, and on any such application the court . . . (b) if satisfied that the authorisation granted by the compulsory purchase order is not empowered to be granted as aforesaid, or that the interests of the applicant have been substantially prejudiced by any requirement of this schedule or of any regulation made thereunder not having been complied with, may quash the compulsory purchase order or any provision contained therein, or the certificate, either generally or in so far as it affects any property of the applicant.'

There is certainly strong support from the wording of para (b) for the view that even if the applicants had succeeded in satisfying the court that they ought to have been served with a notice of the order, and were not, they would then have been in the position of having been able to show, not that the authorisation granted by the compulsory purchase order was not empowered to be granted, but that a requirement of the schedule had not been complied with, and in that case they would have had to show as well that they had been substantially prejudiced by that non-compliance. They would have great difficulty in showing that, because, as I have pointed out, they did in fact know of the order; indeed, correspondence exhibited to Mr Hunt's affidavit contains their letters to the inspector and they were represented at the inquiry, and objected to it. They could and did make whatever objections they thought fit. As it is not necessary for my decision to express any opinion about this submission of counsel for the Minister, I shall refrain from doing so.

Finally, there remains the position of the first applicant, as to whom counsel for the Minister submits that he is in a completely different position from the second applicants, because he is the owner of the land comprised in the purchase order. He was served with the order, and he really has no interest, no business to take part, in the dispute about whether his fellow objectors and adjoining owners, the second applicants, have been served with notice of the order or not. There can, says counsel for the Minister, be no possible prejudice to him—even if there be some prejudice to the second applicants—as appears from the history of this compulsory purchase order. Counsel for the applicants, on the other hand, says that there is no distinction between him and them: although, on my finding, he is an owner of land within all the relevant statutory definitions, it is just as important to him as it was to them that they should be represented here.

On this point also, I accept the submission of counsel for the Minister. In the result, this application must be refused.

*Motion dismissed.*

Solicitors: Markbys, for Layton & Co, Liverpool; Solicitor, Minister of Housing and Local Government.

G.F.L.B.

**COURT OF APPEAL (CRIMINAL DIVISION)**

(SACHS AND FENTON ATKINSON, LJJ, AND MARS-JONES, J)

16th February 1971

R v RICHARDSON

*Criminal Law – Evidence – Witness – Right to refresh memory – Prosecution witness – Previous statement to police – Statement not contemporaneous but soon after events in question – Great delay before trial – Statement read by witness soon before trial – Course suggested by prosecution – Propriety.*

While it is the recognised practice of the court not to allow a witness when in the box to refresh his memory by reading a statement previously made by him unless the statement was made contemporaneously, i.e., at the time of the transaction or so soon afterwards that the facts were fresh in his memory, there is no general rule that a witness may not before the trial see a previous statement made by him which was not contemporaneous in the sense indicated, but was made at some period reasonably close to the event which is the subject of the trial.

Where, therefore, witnesses for the prosecution had made statements to the police some weeks after the commission of the offences charged, and, at the instigation of counsel for the prosecution those statements were shown to the witnesses shortly before the trial, which did not take place till 18 months after the offences charged,

HELD: there had been no prejudice to the defence and the procedure followed was not open to objection.

APPEAL by David Ernest Richardson against his conviction and APPLICATION for leave to appeal against the sentence imposed on him at South East London Quarter Sessions, when he was convicted on two counts of burglary and was sentenced to 12 months' imprisonment concurrent on each count.

*B C J Sedgmore for the appellant.  
M T C Warrington for the Crown.*

**SACHS LJ:** delivered this judgment of the court: On 25th November 1970 at South East London Quarter Sessions before the deputy chairman the appellant, aged 29, was convicted on two counts of burglary, one being charged as on 23rd April and the other on 9th May 1969. He was sentenced to 12 months' imprisonment concurrent on each count. The circumstances leading to the convictions were that on the afternoon of 23rd April 1969 someone broke into a flat in Stepney and stole £50 and a number of premium bonds; that was the offence charged in count 1. Then on 9th May, at about 12.15 pm, another flat in Hackney was burgled; that was the offence charged in count 2. In each case the sole issue was one of identity. As regards the first of those counts, relating to 23rd April, the effective evidence for the prosecution was that of one Mr Norman Kenley. He had come home to the flat where he lived with his parents and as he arrived he met a man leaving. Having shouted to his mother, who did not happen to be in, he chased the man, but could not catch him. On 24th June 1969 he attended an identification parade. There without hesitation he identified the appellant as the man in question. So far as is material, he likewise identified the appellant in the dock, but that was quite subsidiary. He was very properly cross-examined with some vigour and he agreed that he had only seen the man for a matter of seconds: but when it came to the ultimate test at the end of the cross-examination and it was suggested to him that he had made a mistake, the answer came: 'If I had any doubt at all that [the appellant] was not the person who came out of my house, I would say so'. He was then put the stock, but perhaps irrelevant, question whether he knew that other people had made mistakes in the past

and it was again suggested to him that that was here the case, and he answered 'You may be suggesting it, but it still will not alter the fact of what I saw'. A more positive identification does not often occur in the witness box. The other witness called relating to count 1 was a Mrs Morgan, who occupied another flat in the block. She however got a much less clear view of the burglar. She was unable to identify the appellant and her evidence was of no great assistance.

Turning to 9th May 1969, the salient evidence was given by Mr Martin Fahy. He, assisted by Mr Black, was working in a fifth floor flat in Hackney. They heard banging from another flat. Mr Fahy went out and saw that the door of another flat was open and a man was standing in the doorway with his hand on a meter box. They stood for a few moments face to face full on. After a short conversation in that position, during which Mr Fahy continued to have a full and unobstructed view, the man ran away downstairs. Mr Fahy with very proper determination followed. In order to catch him he slid down the banisters and overtook him and again he had what he described as being a very clear view. Later, on 2nd June, Mr Fahy identified the appellant on an identification parade with no less certainty than Mr Kenley did later and was completely unshaken in the witness box. As regards Mr Black, Mr Fahy's workmate, he too failed to identify the appellant and was accordingly a witness of but little assistance to the court.

It is to be observed at this stage that whereas the trial started on 23rd November 1970, the second of the two offences took place on 9th May 1969, over 18 months earlier. For a case of this type that represents a mammoth delay in the operation of the law and is quite lamentable. It is relevant just to mention the sequence of what happened. The case was first listed at London Sessions for 23rd February 1970—a sufficient delay in all conscience of itself. On that occasion Mrs Morgan was ill and the witness Mr Black had not answered when called, so accordingly the case was adjourned. Then one goes for as long an interval as six months; that is the time which elapsed before 12th August 1970, when the case was re-listed—this time at South East London Sessions. It is difficult to refrain from comment criticising the first court for having failed to re-list it earlier, whatever the pressure of other cases. On 12th August Mrs Morgan did not appear, although Mr Black did. The defence insisted that they wanted the presence of Mrs Morgan, useless witness though she turned out to be; the case was once more adjourned and a bench warrant issued for the attendance of Mrs Morgan. Then it was re-listed on 28th October 1970 at the same sessions. This time Mrs Morgan was sick and again the defence insisted that the case should not go on without her presence. So accordingly once more it was adjourned, this time until 23rd November, when at last it came on for trial. Much though the court arrangements after 23rd February may be the subject of criticism, it was no fault of the prosecution that these delays occurred after that date. As regards the defence, something of what happened may be laid at their door; their attitude may have been excusable, but it was somewhat unrealistic.

Now it is for the court to turn to the matters on which the trial judge gave the certificate that the case was fit for appeal. In the circumstances it seems best to read it in full.

'Each of the 5 civilian witnesses called for the prosecution refreshed their memories by reading the statements which they had respectively made to the police in July 1969. They did this shortly before being called to give evidence at the trial. This fact came to light during the course of the trial and objection to what had occurred was immediately taken by the defence. In the course of argument I was referred to Home Office Circular No. 82/1969 ("Supplies of Copies of Witnesses' Statements") dated 9 April 1969. This circular expresses the view that "notwithstanding that criminal proceedings may be pending or

contemplated, the chief officer of police should normally provide a person, *on request*, with a copy of his statement to the police". In the present case, however, it appeared that the prosecution had taken the initiative in telling each of the witnesses concerned that they might refresh their memories, if they wished, by reading their respective statements. Each of the witnesses did this.

I ruled that in view of all the circumstances this was not objectionable and that the defence had not been prejudiced by what had occurred. In reaching this view, I took into consideration (i) the exceptional length of time which had elapsed before the case came on for trial, (ii) that evidence of positive identification at two identification parades was to be called by the prosecution; (iii) that the jury were told that the witnesses had seen their statements to the police before giving evidence, and the jury could therefore evaluate the evidence of the witnesses in the light of this information; (iv) that at the same time the jury were told that they should not convict unless they were sure that the identifications on the identification parades were correct; this was repeated in the summing-up with a warning as to the danger of identification by a single witness and they were enjoined to consider each count separately; (v) that if in comparable circumstances witnesses for the defence were shown their proofs of evidence no objection could be taken. *A fortiori* witnesses, who signed statements which incorporated a warning of the penalties involved if they did not tell the truth in their statement, could see that statement.'

Before going further, it is appropriate to mention the course the trial took, both up to the time when the learned deputy chairman was asked for a ruling and afterwards. Before, at a time when it was unknown to the defence that witnesses had seen the statements, evidence was first adduced as to the count relating to 9th May. Into the box were called Mr Fahy and Mr Black. Both were fully cross-examined; in so doing counsel for the appellant put to each witness discrepancies between their evidence in the box compared with what they had said to the police in their statements. That was done in order to discredit to the jury these witnesses on detail. In at any rate one case it was the defence who at that stage asked for the statement to be made an exhibit. Then Detective Sergeant Woodroffe came into the witness box and it was then that it emerged that their statements made between 2nd June and 4th July had been shown to the witnesses in the circumstances mentioned in the certificate. That had been done on the advice of counsel. There followed a submission and in one part of it it is suggested by counsel for the appellant that they, the witnesses, were 'in effect relying on the written evidence which they had put in their statements about these things and they were reconstructing the events and not remembering them'. That suggestion happens to be quite unfounded. Mr Fahy's evidence is full of specific details that are not to be found in the statement and they are the sort of details which would have carried weight with the jury. Applications were made to recall Mr Fahy and to put further questions to him as to whether he had in fact relied on his statement. It was, moreover, submitted that the evidence of Mr Fahy and Mr Black had in the circumstances been inadmissible. The learned deputy chairman, having referred to the mammoth delay, refused the applications. So Mrs Morgan went into the box and she of course was a harmless witness from anybody's point of view for she had nothing helpful to say. Then came Mr Kenley, to whose evidence reference has already been made.

In the grounds of appeal one finds that it is suggested that the learned deputy chairman erred in law and in fact in failing to exercise his discretion so that the appellant's counsel might 'ascertain what effect the reading of these statements had on their evidence'. But when Mr Kenley went into the box, whilst it was put to him that he had seen his statement the day before, and that there were discrepancies

between his evidence and his statement, the suggestion was not put that in giving evidence he was relying on that statement and not on his memory. Clearly the complaints now made in this particular case are somewhat artificial.

Leaving such points aside, it is, however, necessary to consider what should be the general approach of the court to there being shown in this way to witnesses their statements—which were not ‘contemporaneous’ within the meaning of that word as normally applied to documents used to refresh memory. First, it is to be observed that it is the practice of the courts not to allow a witness to refresh his memory in the witness box by reference to written statements unless made contemporaneously. Secondly, it has been recognised in a circular issued in April 1969 with the approval of LORD PARKER CJ and the judges of the Queen’s Bench Division (the repositories of the common law) that witnesses for the prosecution in criminal cases are normally (though not in all circumstances) entitled, if they so request, to copies of any statements taken from them by police officers. Thirdly, it is to be noted that witnesses for the defence are normally, as is known to be the practice, allowed to have copies of their statements and refresh their memories from them at any time up to the moment when they go into the witness box—indeed counsel for the appellant was careful not to submit that there was anything wrong about that. Fourthly, no one has ever suggested that in civil proceedings witnesses may not see their statements up to the time when they go into the witness box. One has only to think for a moment of witnesses going into the box to deal with accidents which took place five or six years previously to conclude that it would be highly unreasonable if they were not allowed to see them. Is there then anything wrong in the witnesses in this case being offered an opportunity to see that which they were entitled to ask for and to be shown on request? In a case such as the present is justice more likely to be done if a witness may not see a statement made by him at a time very much closer to that of the incident?

Curiously enough, these questions are very bare of authority. Indeed the only case which has a direct bearing on this issue is one which was decided not in this country but on appeal in the Supreme Court of Hong Kong in 1966: *Lau Pak Ngam v Reginam* (1), which is compactly reported. In the view of each member of this court it contains some sage observations, two of which are apt to be quoted. One of them is:

‘Testimony in the witness box becomes more a test of memory than of truthfulness if witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question.’

The other:

‘Refusal of access to statements would tend to create difficulties for honest witnesses but be likely to do little to hamper dishonest witnesses.’

With those views this court agrees. It is true that by the practice of the courts of this country a line is drawn at the moment when a witness enters the witness box and when giving evidence there in chief he cannot refresh his memory except by a document which, to quote the words of Phipson on Evidence, ‘must have been written either at the time of the transaction or so shortly afterwards that the facts were fresh in his memory’. (Incidentally, that definition does provide a measure of elasticity and should not be taken to confine witnesses to an over-short period.) It is moreover a practice which the courts can enforce; when a witness is in the box the court can see that he complies with that practice. The courts, however, must



HUSBAND AND WIFE - Matrimonial home and other properties bought in husband's name with wife's money - Sums transferred by wife to husband at his request - Imposition of trust on husband. <i>Heseltine v Heseltine</i>	CA	214
HUSBAND AND WIFE - Matrimonial home - Separation order obtained by wife - Husband tenant of home - Power of court to exclude husband for limited time - Matrimonial Homes Act, 1967, s 1 (2). <i>Tarr v Tarr</i>	CA	222
INFANT - Custody - Order of magistrates - Appeal - Further evidence - Discretion of appellate court. <i>Re B (T A) (an infant)</i>	Ch D	7
LOCAL AUTHORITY - Statutory powers - Enforcement - Assurance to company of land with access to and use of authority's property - Decision by authority to develop property as housing estate - Right to override company's rights. <i>Dowty Boulton Paul Ltd v Wolverhampton Corporation</i>	Ch D	333
LOCAL GOVERNMENT - Merger of council with other councils to form county borough - Loss of employment of clerk and solicitor - Re-settlement and long term compensation - Local Government (Compensation) Regulations, 1963, regs 8, 14 (1) (c) (f). <i>Myrddin-Baker v Teesside County Borough Council.</i>	QBD	152
MAGISTRATES - Committal to quarter sessions for sentence - Application to change plea of guilty. <i>R v Muford and Lothingland Justices. Ex parte Harber. R v East Suffolk Quarter Sessions. Ex parte Harber</i>	QBD	107
MAGISTRATES - Irish warrant - Endorsement - No inquiry whether prima facie case made out - Habeas corpus - Likelihood of prosecution or detention for political offence - Backing of Warrants (Republic of Ireland) Act, 1965, s 1 (2) (b). <i>R v Brixton Prison Governor. Ex parte Keane</i>	QBD	38
MAGISTRATES - Natural justice - Magistrate acting in administrative or executive capacity - Duty to act openly, impartially and fairly - Seizure of sweet potatoes by local authority officer - Meeting between justice and local government officials before hearing - Box of sweet potatoes shown and sample cut open - Retirement at end of hearing of magistrate with public analyst and chief veterinary officer - Advice received, but not communicated to defendants - Food and Drugs Act, 1955, s 9 (3) - Colouring Matter in Food Regulations, 1966, reg 5 (1). <i>R v Birmingham City Justices. Ex parte Chris Foreign Foods (Wholesalers) Ltd</i>	QBD	73
QUARTER SESSIONS - Appeal - Plea - Change of plea - Enquiry whether plea of guilty at magistrate's court equivocal - Right to remit case to magistrate - Quarter sessions entitled to consider only what happened before magistrate - Nothing in proceedings before magistrate casting doubt on plea. <i>R v Marylebone Magistrate. Ex parte Westminster City Council. R v Inner London Quarter Sessions. Ex parte Westminster City Council</i>	QBD	239
RACE RELATIONS - Housing - Council houses - Tenants restricted to British subjects - Validity - Action for declarations by local authority - Competency - Race Relations Act, 1968, s 2 (1), s 19 (10). <i>London Borough of Ealing v Race Relations Board</i>	QBD	131
RATING - Machinery and plant - Generation of power - Electric motors, hydraulic pumps, and air compressors - Motive power derived from electricity supplied to factory - Hydraulic and pneumatic power distributed throughout factory - Rating and Valuation Act, 1925, s 24 (1), Sched 3 (1) (a) - Plant and Machinery (Rating) Order, 1960, Sched. <i>Chesterfield Tube Co Ltd v Thomas (Valuation Officer)</i>	CA	1
RENT CONTROL - Contract referred to tribunal - Entry upon consideration of reference - Papers considered by each member of tribunal individually - Assembly and visit to view premises - No admission obtained - Letter of withdrawal - Not operative till received by tribunal - Rent Act, 1968, s 73 (1). <i>R v Tottenham District Rent Tribunal. Ex parte Fryer Bros (Properties) Ltd</i>	QBD	94
ROAD TRAFFIC - Driving test - Duty of examiner appointed by Ministry. <i>British School of Motoring Ltd v Simms and Another, Stafford Third Party</i>	Assizes	103
ROAD TRAFFIC - Driving while disqualified - Outstanding offences taken into consideration - Similar offence. <i>R v Jones</i>	CA	36
ROAD TRAFFIC - Driving with blood alcohol proportion above prescribed limit - Arrest without warrant - Powers of police to detain thereafter - Road Safety Act, 1967, ss 1, 2 (2), 2 (4), 3 (1), 4. <i>R v Mackenzie</i>	Assizes	26
ROAD TRAFFIC - Driving with blood alcohol proportion above prescribed limit - Ascertainment of alcohol proportion - "Ascertainment from laboratory test" - Drink consumed after cessation of driving - Adjustment of test - Road Safety Act, 1967, s 1 (1). <i>Rowlands v Hamilton</i>	HL	241
ROAD TRAFFIC - Driving with blood-alcohol proportion exceeding prescribed limit - Attempting to drive - Car stopped by person wrongly believed by defendant to be police officer - Ignition keys handed over - Departure of defendant from car - Return - Demand for handing back of keys - Refusal - Subsequent breath test - Road Safety Act, 1967, s 1 (1). <i>Harman v Wardrop</i>	QBD	255



ROAD TRAFFIC - Driving with blood alcohol proportion above prescribed limit - Provision of specimen - Blood - Analysis by ordinary equipment and skill - Gas chromatography.		
Smith v Cole .. .. .	QBD	97
ROAD TRAFFIC - Driving with blood-alcohol proportion above prescribed limit - Specimen for laboratory test - Failure to supply - Reasonable excuse - Excuse relating to blood specimen only - Liability to supply specimen of urine - Direction to jury - Road Safety Act, 1967, s 3 (3) (6).		
R v Harling .. .. .	CA	29
ROAD TRAFFIC - Light signals - Fire brigade vehicles - Passing red lights - Order regulating - Validity.		
Buckoke v Greater London Council .. .. .	CA	321
STATUTE - Construction - Purposive interpretation - Act providing minimum sentences for specified criminal offences.		
Kennedy v Spratt .. .. .	HL	203
TOWN AND COUNTRY PLANNING - Compulsory purchase - Compensation - Assessment - Application of Pointe Gourde principle to cases under Land Compensation Act, 1961, s 6 (1), Sched 1, part 1.		
Wilson v Liverpool City Council .. .. .	CA	168
TOWN AND COUNTRY PLANNING - Compulsory purchase - Compensation - Reference to Lands Tribunal - Agreement between parties as to basis of assessment - Subsequent decision of House of Lords that that basis wrong - Power of court to remit case to tribunal - Discretion.		
Wilson v Liverpool City Council .. .. .	CA	168
TOWN AND COUNTRY PLANNING - Permission - Refusal - Appeal to Minister - Decision in accordance with general policy - Need for genuine consideration of particular matter - Town and Country Planning Act, 1962, s 179 (1) (3) (b).		
H Lavender and Son Ltd v Minister of Housing and Local Government .. .. .	QBD	186
TOWN AND COUNTRY PLANNING - Permission - Refusal - Authority required to purchase land - Compensation - Assessment.		
Margate Corporation v Devotwill Investments Ltd .. .. .	HL	19
TRADE DESCRIPTIONS - Defence - Act or default of another person - 'Another person' - Company - Commission of offence through breach of duty of branch manager - Trade Descriptions Act, 1968, s 11 (2), s 24 (1).		
Tesco Supermarkets Ltd v Natrass .. .. .	HL	289
TRADE DESCRIPTIONS - Defence - 'Mistake' - 'Act or default' - Offence due to conduct of employee - Trade Descriptions Act, 1968, s 24 (1) (a).		
Birkenhead and District Co-operative Society Ltd v Roberts .. .. .	QBD	194
TRADE DESCRIPTIONS - False description - Milk - Foil cap on bottle accurately describing milk and bearing retailer's name - Names of milk suppliers to whom bottle belonged embossed on bottle - Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1).		
Donnelly v Rowlands .. .. .	QBD	100
TRADE DESCRIPTIONS - False description - Sale of second-hand car - False number of miles on indicator - Defence - Reliance by defendants on information supplied to them - Act or default of another person - Failure to take all reasonable precautions or exercise all due diligence - Trade Descriptions Act, 1968, s 24 (1) (a), (b), (3)		
London Borough of Richmond v Motor Sales (Hounslow) Ltd .. .. .	QBD	236

take care not to deprive themselves by new, artificial rules of practice of the best chances of learning the truth. The courts are under no compulsion unnecessarily to follow on a matter of practice the lure of the rules of logic in order to produce unreasonable results which would hinder the course of justice. Obviously it would be wrong if several witnesses were handed statements in circumstances which enabled one to compare with another what each had said. But there can be no general rule (which incidentally would be unenforceable, unlike the rule as to what can be done in the witness box) that witnesses may not before trial see the statements they made at some period reasonably close to the time of the event which is the subject of the trial. Indeed one can imagine many cases, particularly those of a complex nature, where such a rule would militate very greatly against the interests of justice.

On the basis of that general approach, this court now returns to the facts of the present case. There had been great delay in the matter coming before the courts and there appears to this court that nothing unreasonable was done in the particular circumstances. Indeed it can be said in addition that in this case the vital evidence was that of visual identification and that was evidence which was in no way assisted by the statements. In those circumstances this court has come to the conclusion that the trial judge was correct in his ruling and there is nothing as to which the defence can legitimately complain in that respect.

From there the court turns to what might be called the ancillary points which it was sought to adduce in support of the appeal. It has already been mentioned that the identification was by two witnesses who expressed their views with a degree of certainty rare in relation to cases of this type which come before this court. It was identification at parades reasonably close to the time of the offences. A considerable number of submissions on various matters have been made to this court attacking the summing-up on one point or another. They are not the sort of criticisms which, in the view of this court, merit detailed examination. It is quite sufficient to say that broadly speaking the learned deputy chairman put the matter clearly before the jury, he made it perfectly plain to them that they must judge each of these two identification cases separately and he told them more than once that they really must be sure on this matter of identification. Indeed the only point on which perhaps some criticism might be directed to the conduct of the trial was that the learned deputy chairman allowed undue scope for questions in cross-examination whether witnesses knew what happened in other cases. Such questions are irrelevant and are really in the nature of comment. Of course some indulgence is usually permitted to counsel, but a careful rein must be put on it. In those circumstances this court has unhesitatingly come to the conclusion that there is no ground for saying either that the appeal should be allowed on a point of law or that there is anything in the summing-up that could have led to a miscarriage of justice. The appeal on conviction is accordingly dismissed.

[The court then considered, and refused, an application for leave to appeal against sentence.]

*Appeal dismissed: application refused.*

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(PHILLIMORE, LJ, GEOFFREY LANE AND COOKE, JJ)

26th January 197

R v PAGE

*Criminal Law—Obtaining pecuniary advantage by deception—Evasion of debt—Evasion of payment of debt basis of offence—Worthless cheque—Representations by drawer—Theft Act 1968, s 16 (2) (a).*

By s 16 (1) of the Theft Act 1968: 'A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction' be liable to punishment. In s 16 (2) the definition of 'pecuniary advantage' includes cases where (a) any debt or charge for which [the defendant] makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred.

The reference in s 16 (2) (a) to the evasion of a debt means evasion of the payment of a debt.

The drawer of a cheque impliedly represents (i) that he has an account at the bank on which the cheque is drawn; (ii) that he has authority to draw on it for the amount for which the cheque is drawn; (iii) that the cheque, as drawn, is a valid order for the payment of that amount, ie, that the present state of affairs is such that in the ordinary course of events, the cheque will on its future presentation be duly honoured. He does not represent that he has at the time of drawing money in the bank to the amount drawn for inasmuch as he may have authority to overdraw or may intend to pay in sufficient money to clear the cheque before it can be presented.

APPEAL by Gregory Arthur Page against his conviction at East Sussex Quarter Sessions on an indictment containing one count charging obtaining a pecuniary advantage by deception and three counts of obtaining property by deception, he being sentenced to concurrent terms of nine months' imprisonment.

R J Seabrook for the appellant.

A S Hacking for the Crown.

PHILLIMORE LJ delivered this judgment of the court: The appellant appeared at East Sussex Quarter Sessions in October 1970 and he was convicted on one count of obtaining a pecuniary advantage by deception and on three counts of obtaining property by deception, and was sentenced to nine months' imprisonment concurrent on each count. He appeals against his conviction by leave of the single judge and he also applies for leave to appeal against sentence.

This is, in fact, obviously a very dishonest young man and counsel for the appellant's argument has not been hampered by any merits. What happened was that the appellant apparently opened a bank account and it was only in funds to the extent of a little over £13 on Maundy Thursday. He had actually opened it on 10th March. On 25th March, which was the Wednesday before Easter, he telephoned to the bank manager and got authority to cash two cheques, one for £30 and one for £40, and he proceeded to draw these cheques, but they were not presented until some days later. The result, of course, of drawing these cheques was that as and when they were presented the amount by which the account was in credit was dissipated.

However, on the following day, 26th March, the Maundy Thursday, the appellant went to a car hire firm and he hired a car, and that involved two things. He had to pay for the hire and so he drew a cheque for £23 12s 6d in favour of the firm, Self Drive Cars, and he also had to make a deposit against the possibility of damage and

so he drew a cheque for £15. These cheques have clearly been altered at some stage, but when is by no means clear. The one for £23 12s 6d as originally drawn would appear to be dated '26/4'; that would be April 1970, but at some stage the '4' was struck out, and '3' substituted and what appear to be the appellant's initials. The other cheque appears to be dated '25', and then there is a figure which might be a '6' or might be a '4', and then subsequently, that figure not having been clearly struck out, there was written after it '3rd'. The appellant did not tell the representative of the car hire firm that he had post-dated these cheques if he had, and she did not realise that they were other than drawn for immediate presentment. The first, that is the cheque for £23 odd, was presented three times and it was marked successively 'post dated', 'please represent' and 'refer to drawer'. Whether at any such stage the alterations to which I have referred were made the court is not aware. The second cheque was presented twice. On the first occasion it was marked 'please re-present' and on the second 'refer to drawer'. Again, when was the alteration made? when it was originally drawn on or such subsequent occasion?

On the same day the appellant went to a shop where he was known, Varsity Cleaners, and asked the shopkeeper to cash a cheque for him for £20 since the bank had closed, and the woman in charge did so and he drew up this cheque. On this occasion it is quite clearly post-dated. He wrote '26/4/70' and he certainly did not tell the person to whom he handed the cheque that it was post-dated and she did not observe it. When presented it was marked 'refer to drawer'. Then, coming to the third count, again on the same day he went to yet another shop, Messrs Fowkes Bros, where he was known and he did exactly the same thing. He asked them to cash a cheque for £20 on the ground that the bank was closed and he drew it for '26/4/70', so it was post-dated by a month. That ended his activities on Maundy Thursday. On the Saturday he entered a shop called Cyril Savage with a girl friend and purchased a jacket and a pair of jeans, and paid by cheque. This is even more remarkable because he appears to have dated this '28' and then he put a '4' and then he put 'Mar.' standing for March and then '1970'. The shopkeeper observed the '4' which indeed was written on at the time and not subsequently. At all events this cheque when presented was marked 'refer to drawer'.

None of these cheques has ever been met. It is quite plain that the appellant fully appreciated his position because he wrote a letter to his bank manager following the conversation about the cheques which he had leave to draw and present, and in that he wrote:

'I wish to apologise for the unseemly state of my bank account. It seems that my partner and the resources of our business have both disappeared. I have certain other cheques outstanding post-dated 20th and 28th of next month. I shall settle my present overdraft and these outstanding cheques with you at the earliest possible moment, not later than the 20th of next month. I wish once again to apologise for this most unfortunate incident.'

He did not succeed in settling his overdraft or the cheques, and he was seen by a police officer on 13th June. He was asked first of all about the jacket and the trousers and he said: 'I didn't know I had done anything wrong. Since when has it been an offence for a cheque to bounce?' The officer said: 'It's not a case of one cheque, is it? You have passed more than one'. He replied 'I realise that, it's about £100, but I thought it would be covered'. Asked how he thought it would be covered, he said: 'I had this business in London and a friend was going to invest in it with me. He told me he would deposit well over £100, but he has let me down'. Then he was asked: 'Who is this friend?' and his reply was: 'I can't think of his name at the moment'. The officer said: 'Assuming that this friend does exist, did you check with

your bank to ensure that you had money in your account, because my information is that you rang the bank to ask if you could cash a cheque for £40 and then promptly cashed another one for £30 which put you well in the red.' The appellant answered: 'No I didn't check it, because he [that was the friend] promised to pay the money in'. The appellant subsequently told the police that he was going to plead guilty to all the offences and he did so when he came before the justices, but when the court was listening to the plea put forward by the appellant's solicitor, the justices' clerk took the view that what was being said in mitigation amounted to a defence, so the case after that proceeded as a plea of not guilty.

There was one further interview with the police which is perhaps just worth recording briefly. According to the officer, on 10th July he said to the appellant: 'The first cheque I want to speak about is the one for £15 which you paid to the self-drive hire people. This was in respect of insurance'. The answer to that was: 'That one has been cancelled and it wasn't for insurance. It was a cheque I left behind as a deposit toward any damage, when I would have to pay the first £15.' The officer said: 'The fact remains that if it was known at the time that this cheque was no good, then you would not have been allowed to take possession of the car,' to which the appellant answered: 'No, I suppose not'. The officer said: 'The next cheque I have is the one for £20 cash which you paid into Varsity Cleaners and obtained £20. This cheque was also marked "return to drawer". In addition it has been post-dated to the 26th April, when in fact you tendered it on 25th March. Did you ask Mrs Ashby who cashed it for you, if you could post-date it?' The reply was: 'Do I have to answer that'. He was then asked about another cheque for £20 and about the fact that it was post-dated and he answered: 'No comment'.

The officer then said: 'I understand that you had an insurance claim due to be paid to you in respect of a car accident'. The appellant said: 'Yes, it should have been paid in before now. I thought that it would help towards paying off the cheque'. He was asked: 'How much is it worth?' and he said: 'I don't know'. He was asked: 'Who is the insurance company'. He said: 'I don't know, but I have written it down somewhere'. He was then asked: 'Were you thinking the insurance would clear your debts?' to which he replied: 'Well, partly'. He was asked: 'How did you expect the rest to be met?' and he said: 'Someone is lending me the money'. Asked 'Who is that?' he said: 'That's up to me to produce him in court'. The officer said: 'If this person exists, then why not tell me so that we can enquire? It may be that we would find that you have a genuine answer to some of the charges'. The answer was: 'You have already charged me with some and from what I can see now, I've got a chance of getting away with them'. The officer said: 'That is a matter for the court, but you have put forward two or three explanations to show why you thought you would have sufficient funds, and you have not substantiated any of them. I would have thought it would have been in your interest for them to be checked, if they were true. Anyway, when you passed these cheques you knew you were in the red because you telephoned your bank manager and asked if you could pass a cheque for £40, knowing that this would leave you overdrawn.' The appellant replied: 'Yes, for car repairs'. The officer asked: 'Have you ever bothered to contact anyone whom you passed cheques to, to assure them that you were going to pay these bills? That would have been a reasonable thing to do.' The answer was 'I wrote to the bank'. There it was, and he gave evidence about his expectations at the time when he drew these cheques? It is quite obvious that the jury disbelieved him and accordingly convicted.

What is said on his behalf by counsel for the appellant is not that there is, as it were, any merit in the case, but that there are some technical points which are good points and on which this appeal should be allowed.

The first point that he takes I think is really in regard to the first count. On the

first count he was convicted of the evasion of a debt by deception, namely, by representing that the cheques for £15 and £23 12s 6d presented to the car hire firm were good and valid orders for payment. Counsel for the appellant says that there was no evasion there. The debt was not evaded; it still exists. The appellant still owes the money for both these cheques, and accordingly there was no offence within the meaning of s 16 (1) of the Theft Act 1968 which provides:

'A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.'

Section 16 (2), defining 'pecuniary advantage' includes cases where

'(a) any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred.'

Counsel for the appellant says that these debts were not evaded at all, since they still exist. Quite obviously, if that was the meaning of the Act, one could never evade the debt. The answer is that it means evading payment, and so the court thinks that there is really nothing in that point.

Then in relation to all these four counts counsel for the appellant says that the appellant never represented that any of these cheques was a good and valid order, and he relies for that proposition on the evidence of the bank manager, who he says, did in answer to him say that the cheques as drawn were good and valid orders. There is some dispute between counsel as to exactly what the bank manager said, but the court is content to assume that counsel for the appellant is right.

What is the law in regard to a cheque? It is set out very conveniently and very clearly in Kenny on the Outlines of Criminal Law (19th edn, p 359, para 346), and I am indebted to GEOFFREY LANE J for its assistance. It is put like this:

'Similarly, the familiar act of drawing a cheque (a document which on the face of it is only a command of a future act) has been held to imply at least three statements about the present: (1) that the drawer has an account with that bank; (2) that he has authority to draw on it for that amount; (3) that the cheque, as drawn, is a valid order for the payment of that amount (i.e. that the present state of affairs is such that, in the ordinary course of events, the cheque will on its future presentment be duly honoured).

'It may be well to point out, however, that it does not imply any representation that the drawer now has money in this bank to the amount drawn for, inasmuch as he may well have authority to overdraw, or may intend to pay in (before the cheque can be presented) sufficient money to meet it.'

There is no doubt that on the bank manager's evidence the appellant had not any authority to overdraw in respect of any of these specific cheques. His evidence was that he hoped before they became due, particularly these that were post-dated (he was saying they were all post-dated) to produce funds to meet them. Of course, if he succeeded in doing so, all would have been well, and if indeed he had any intention of doing so and any real prospect of doing so, of course, there would be no offence. There would not be any dishonesty. But if, as the jury clearly found, he had not any prospects whatever of finding this money and these cheques were drawn quite recklessly without regard to whether there was any chance of their being met or not, and indeed when there was every prospect that they would not, then they were drawn dishonestly and it is rubbish to say that they were good and valid orders. It is just playing with words.

The case was put to the jury, this court thinks succinctly, extremely clearly and



entirely fairly. The short fact of the matter is that these offences were made out. The evidence was completely overwhelming and, notwithstanding counsel for the appellant's ingenuity, there is no possible ground for interfering with these convictions. To that extent the appeal fails.

[His Lordship went on to consider the question of sentence and stated that the application for leave to appeal against sentence would be allowed, the hearing treated as the appeal, and a sentence substituted to allow the appellant to be released from prison forthwith.]

*Appeal dismissed. Sentence varied.*

Solicitors: Registrar of Criminal Appeals ; F H Bushy, Town Clerk, Eastbourne.

T.R.F.B.

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CHANCERY DIVISION

(PLOWMAN, J)

18th, 19th, 22nd February, 8th March 1971

STEVENS v LONDON BOROUGH OF BROMLEY

*Town and Country Planning—Enforcement—Notice—Service—"Occupier"—Licensee—Caravan dweller—Town and Country Planning Act, 1962, s 45 (3) (a).*

The plaintiff without planning permission developed as a caravan site land which he had purchased, making a road and hard standings for the caravans. The caravan dwellers owned the caravans which they used as their permanent homes, and paid weekly sums to the plaintiff for the use of their 'pitches'. On September 2nd 1965, the local planning authority served an enforcement notice on the plaintiff under s 45 of the Town and Country Planning Act, 1962, requiring him to demolish the road and hard standings and to discontinue the use of the land as a caravan site. Similar notices were served on some of the caravan dwellers on different dates. The plaintiff commenced an action for a declaration that the enforcement notices were invalid on the ground that the caravan dwellers were 'occupiers' within s 45 of the Act and as such they should have been served with the notices on the same day as he was himself served. The court having found that the relationship of landlord and tenant had never been created and that the caravan dwellers were licensees,

HELD: licensees were capable of being occupiers within the meaning of s 45 of the Town and Country Planning Act, 1962, in appropriate circumstances, and the caravan dwellers in the present case were occupiers of the caravan site when the local authority's enforcement notices were served; accordingly, those notices were invalid.

ACTION by the plaintiff, Harry John Stevens, against the London Borough of Bromley seeking a declaration that documents purporting to be enforcement notices served on the plaintiff and on other persons requiring them to demolish certain roads and hard standings and to discontinue the use of certain land as a caravan site were invalid and of no effect.

*Michael Albery QC and Michael Essayan for the plaintiff.*

*John Drinkwater for the defendants.*

*Cur adv vult*

8th March. **PLOWMAN J** read the following judgment: The plaintiff is the owner of a caravan site near Biggin Hill in Kent. The defendants are the planning authority for the district. In this action the plaintiff claims a declaration that an

enforcement notice which the defendants served on him is invalid. The alleged invalidity arises out of the fact that the defendants served that notice not only on the plaintiff, but also on a number of caravan dwellers on the site who, the plaintiff contends, were occupiers of their pitches. In some cases service on those persons was effected on a different day from that on which the plaintiff was served, and for that reason is alleged to be bad on the authority of *Bambury v London Borough of Hounslow* (1). That case decided that where the owner and occupier of land are not the same person, an enforcement notice must be served on each on the same date, so that the date on which the notice takes effect is, in each case, the same.

The defence to the plaintiff's claim is twofold. In the first place it is said that the caravan dwellers in question were not occupiers but licensees; that the plaintiff, as well as being owner, was sole occupier of the site and that service on other persons was merely a precautionary measure and can be ignored. Secondly, and in the alternative, it is said that if in fact those other persons were not licensees, the plaintiff is estopped from denying that fact. If the true position is that the caravan dwellers were both licensees and occupiers, the defence of estoppel does not arise, for it assumes that licensees cannot in law be occupiers.

The history of the matter is as follows. In 1964 the plaintiff, whose business is that of operating caravan sites, purchased a piece of land, some 7½ acres in extent, near Biggin Hill. Part of that land, known as the Restavon Caravan Site covering some three acres, is an authorised site and no question arises in respect of it. The remainder of the land has no planning permission for caravans. It is this area with which I am concerned and to which I hereafter refer as 'the site'. In due course the plaintiff began to develop the site as a caravan site, apparently under the impression that it had existing user rights. He put down a road and hard standings, and in February 1965 the first caravan appeared on the site when a Mr Bernard Wicks took up residence with his two sons. Before the end of September 1965 there were ten or 11 occupied caravans on the site.

The use of the site for caravans came to the attention of the defendants who, on 29th July 1965, served a notice on the plaintiff under s 215 of the Town and Country Planning Act 1962 (which I will call 'the Act of 1962') requiring him to state in writing the nature of his interest in the site and also the name and address of any other person known to him as having an interest in it. An appropriate form for a reply was attached. The plaintiff passed on this notice and the form to his surveyor, Mr Toms, a partner in the firm of Body Son & Fleury, chartered surveyors and land agents of Old Bond Street, W1. At Mr Toms's suggestion, the plaintiff signed the form in blank and sent it to Mr Toms to fill up and return to the defendants, which he did. The defendants rely on the form, so completed, as one of the representations giving rise to an estoppel and I must refer to it. It reads as follows:

'In reply to your notice, dated the 29th day of July 1965, under the above Act, requiring me to give you certain information as to my interest and the interest of other persons in land at Berry's Green Road, Single Street. I hereby state that the answers to the questions set out in the schedule hereto comprise a true and correct statement of all the information required by the said notice, so far as the same is within my knowledge. Dated the 16th day of August 1965.'

The parts of the schedule are as follows: '1. Name and address of occupier' and that was answered by 'H. J. Stevens Esq.' H J Stevens is the plaintiff. '2. State whether land or premises are held by occupier: (a) On weekly tenancy—(b) On agreement, and if so, for what period—(c) on lease, and if so for what term.' And the answer given is 'Not rented, [the plaintiff] is the owner as well as occupier'. Then question 7

(1) 130 JP 314; [1966] 2 All ER 532; [1966] 2 QB 204.

was: 'Name and address of any person (other than those above specified) having an interest in the premises—state nature of such interest', and the answer was: 'We are instructed there are ten occupied caravans on the land and a list of the occupiers' names will be submitted in the course of the next few days. They are licensees only'. In due course Mr Toms supplied a list of the 'caravan tenants', as they were described. On 24th September 1965 the defendants issued an enforcement notice which I should read. It is addressed to the plaintiff and it states as follows:

'WHEREAS: 1. You are the owner and occupier of land situate at Berry's Green Road, Single Street in the county of Kent which is more particularly delineated and coloured pink on the plan annexed hereto (hereinafter called "the land"). 2. It appears to the [defendants] who are the local planning authority that the land has been developed by: (a) The carrying out thereon of civil engineering operations, namely the construction of a road and hard standings for caravans, and (b) the making of a material change in the use of the land to use as a caravan site by the stationing thereon of caravans for the purposes of human habitation without the planning permission required in respect thereof under Part III of the Town and Country Planning Act 1962. 3. The [defendants] consider it expedient having regard to the provisions of the development plan and to all other material considerations to serve this notice. NOW THEREFORE pursuant to Section 45 of the Town and Country Planning Act 1962 the [defendants] HEREBY REQUIRE YOU within two calendar months from the date on which this notice takes effect: (1) To demolish the said road and hard standings and remove from the land all materials arising from such demolition (2) To discontinue the use of the land as a caravan site (3) To restore the land to its condition before the development took place THIS NOTICE SHALL TAKE EFFECT, subject to the provisions of Section 46 (3) of the Town and Country Planning Act 1962, at the expiration of a period of thirty days from the service thereof upon you. Dated this 24th Day of September 1965 [signed by] Deputy Town Clerk, Town Hall, Bromley, Kent. NOTE: Your attention is drawn to the rights of appeal against an enforcement notice contained in s 46 of this Act, a copy of this section and other relevant sections of the Act are annexed hereto.

It is common ground that that notice was served on the plaintiff on 27th September. It is also common ground that it was served on a number of caravan dwellers on the site on days other than 27th September. For example Mr Bernard Wicks, whom I have mentioned, was served on 25th September and a Mr Cousins, who had gone to live on the site in the previous July, was also served on 25th September. From this it follows that, in relation to the plaintiff, the notice was due to take effect on 27th October, whereas in the case of Mr Wicks and Mr Cousins the notice was due to take effect on 25th October. It is not disputed that if Mr Wicks or Mr Cousins, or any one of the other caravan dwellers who were served, was an occupier of any part of the site, the enforcement notice is bad on the authority of *Bambury v London Borough of Hounslow* (1) to which I have already referred.

The plaintiff appealed to the Minister against the enforcement notice on a number of planning grounds specified in s 46 of the Act of 1962. A public local inquiry was held by a Ministry Inspector on 14th June 1966, and on 5th October 1966 the appeal was dismissed. The letter giving notice of the dismissal of the appeal concludes as follows:

'Accordingly, the Minister hereby directs that the notice be varied by the

(1) 130 JP 314; [1966] 2 All ER 532; [1966] 2 QB 204.

deletion from the first paragraph of the requirements of the words "two calendar months" and the substitution therefor of the words "six calendar months". Subject thereto, the Minister hereby dismisses your clients' appeals, upholds the enforcement notice and refuses permission for the development to which the notice relates. This letter is issued as the Minister's determination of the appeal but an appeal may be made against this decision to the High Court on a point of law under the provisions of s 180 of the Act.'

The plaintiff gave evidence on oath at the inquiry. In the course of his cross-examination by counsel for the defendants he stated that (and I quote from the inspector's report) 'all the occupiers of the caravans on the appeal site are licensees'. The defendants rely on that statement as the other of the representations giving rise to an estoppel. The plaintiff's explanation of this evidence is that the National Federation of Site Owners, of which he is a member, had issued a circular in April 1965 advising its members to define their relationship with their caravan dwellers as that of licensor and licensee and not landlord and tenant. Although the appeal was dismissed on planning grounds, it still remained open to the plaintiff to attack the validity of the enforcement notice and, on 3rd May 1967, the writ in this action was issued.

I propose first to consider the question whether the caravan dwellers with whom I am concerned were tenants or licensees. It is not disputed that if they were tenants they were occupiers, in which case the plaintiff is entitled to succeed in this action subject to the question of estoppel. If they were licensees, the question arises whether they were also occupiers. Counsel for the plaintiff stresses that these caravans were the homes of their occupants. These people were not temporary residents or birds of passage but people who had bought their caravans from the plaintiff and had them installed on the site as their fixed address. The caravans had a floor space of 400 sq feet divided into rooms and were supplied with flush toilets, mains electricity, gas cookers, immersion heaters and small gardens which the caravan dwellers cultivated for themselves. Mr Wicks marked off his boundary with big rocks and Mr Cousins, in 1956, put up a trellis dividing his site from the adjoining pitch and in the following year he put up a little flint wall on his opposite boundary. Incidentally, Mr and Mrs Cousins are still living in their caravan on the site.

The caravan dwellers were provided with a standard form of rent book which, however, recorded no more than the weekly payments made for the use of their pitches. The formal parts of the book were never filled in. Site rules were drawn up by the plaintiff, and a copy of these was displayed in the site office and at any rate in some instances caravan dwellers were also given a copy. These provided, inter alia, for a caravan owner giving a month's notice in writing if he wished to remove his caravan. There was no provision for any notice to be given by the plaintiff who said that he had never given notice to anyone on the site, but if he had had reason to do so, he would have given four weeks' notice. There is no decisive evidence one way or the other whether the caravan dwellers were given exclusive possession of their pitches. It was, I think, assumed on both sides that the plaintiff or his site manager would not enter on a caravan owner's pitch without permission, but this seems to have been a matter of courtesy as much as of entitlement. In these circumstances and bearing in mind the plaintiff's statements in his reply to the s 215 notice and his evidence at the inquiry—matters which cannot easily be shrugged off—I am not satisfied that the relationship of landlord and tenant was ever created and I hold these caravan dwellers to have been licensees.

The question then arises whether, although only licensees, they were nevertheless 'occupiers' at the time when they were served with the enforcement notice. The relevance of this question arises from s 45 (3) of the Act of 1962, which requires an

enforcement notice to be served on the owner and occupier of the land to which it relates. The Act of 1962 like its predecessor, the Town and Country Planning Act 1947, contains no definition of the word 'occupier', and the question whether any of the caravan dwellers on the site was an occupier is a mixed question of law and fact. I approach it in the first place without reference to authority. It is, I think, possible to derive some assistance as to the meaning of the word 'occupier' from the Act itself. Section 45 is in these terms:

'(1) Where it appears to the local planning authority—(a) that any development of land has been carried out without the grant of planning permission required in that behalf in accordance with Part III of this Act, or (b) that any conditions or limitations subject to which planning permission was granted have not been complied with, then, subject to any directions given by the Minister, and to the following provisions of this section, the local planning authority, if they consider it expedient to do so having regard to the provisions of the development plan and to any other material considerations, may, within the period specified in the next following subsection, serve a notice under this section (in this Act referred to as an "enforcement notice").

'(2) The period for the service of an enforcement notice—(a) where the notice relates to the carrying out of development, is the period of four years from the carrying out of that development, and (b) where the notice relates to non-compliance with a condition or limitation, is the period of four years from the date of the alleged failure to comply with it.

'(3) Where the local planning authority serve an enforcement notice, the notice—(a) shall be served on the owner and occupier of the land to which it relates, and (b) may, if the authority think fit, also be served on any other person having an interest in that land, being an interest which in their opinion is materially affected by the notice.

'(4) An enforcement notice—(a) shall specify the development which is alleged to have been carried out without the grant of planning permission as mentioned in paragraph (a) subsection (1) of this section or, as the case may be, the matters in respect of which it is alleged that any such conditions or limitations as are mentioned in paragraph (b) of that subsection have not been complied with, and (b) may require such steps as may be specified in the notice to be taken, within such period as may be so specified, for the purpose of restoring the land to its condition before the development took place, or of securing compliance with the conditions or limitations, as the case may be, and in particular may, for that purpose, require the demolition or alteration of any building or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations.

'(5) Subject to the following provisions of this Part of this Act, an enforcement notice shall take effect at the end of such period (not being less than twenty-eight days after the service thereof) as may be specified in the notice.'

Then s 46 provides for an appeal to the Minister against an enforcement notice and I will read part of it:

'(1) A person on whom an enforcement notice is served, or any other person having an interest in the land, may, at any time within the period specified in the notice as the period at the end of which it is to take effect, appeal to the Minister against the notice on any of the following grounds, that is to say—(a) that planning permission ought to be granted for the development to which the enforcement notice relates; (b) that planning permission has been granted for that development; (c) that no planning permission was required in respect of that development, or, as the case may be, that the conditions or limitations



subject to which planning permission for that development was granted have been complied with; (d) that what is assumed in the enforcement notice to be development did not constitute or involve development ...'

Then s 47 provides for penalties for non-compliance with an enforcement notice. The early parts of that section deal with penalties on the owner of the land, but sub-s (5) is as follows:

'Where, by virtue of an enforcement notice, a use of land is required to be discontinued, or any conditions or limitations are required to be complied with in respect of a use of land or in respect of the carrying out of operations thereon, then if any person uses the land or causes or permits it to be used, or carries out those operations or causes or permits them to be carried out, in contravention of the notice, he shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding one hundred pounds; and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding twenty pounds for every day on which the use is so continued'.

It is, in my judgment, a fair inference from those provisions that the intention of the legislature was, as counsel for the plaintiff submitted, to ensure that anyone who might be prejudiced by an enforcement notice should be served with it and have an opportunity of appealing against it. Common fairness might well require that that should be done in the case of a licensee just as much as in the case of a tenant. It would, for example, be strange if when steps were about to be taken to demolish a dwelling, or to prevent its continued use as a dwelling, the man whose home that dwelling was, was not entitled to be served with notice of the proposal because he was a licensee and not a tenant. Whatever the status of such a person, vis-à-vis the owner of the land, he would, in my judgment, vis-à-vis the local planning authority, be an occupier for the purposes of s 45. A man who is seen to be residing on the site may well be entitled, in my view, to be served with an enforcement notice which adversely affects him, without the planning authority having to enquire into his precise status and to resolve the possibly difficult questions of law and fact on which it depends.

Cases may be found in the reports in which a mere licensee has been held to be an occupier for the purposes of a statutory provision referring to the occupier of land who is not further defined. For example, in *Dawson v Midland Ry Co* (1) the plaintiff who had a licence from the occupier to graze land adjoining a railway line recovered for the loss of his horse which escaped through a defective fence on to the defendant's line, on the ground that he was himself an occupier of the land within the meaning of s 68 of the Railways Clauses Consolidation Act 1845. That case was cited with approval in the Privy Council in *Madrassa Anjuman Islamia of Khohwad v Johannesburg Municipal Council* (2), where there is a helpful passage in the opinion of VISCOUNT CAVE, but before reading that, I will refer to the headnote which is as follows:

'By s.4 (b) of the Vrededorp Stands Act, 1907, the owner of a stand at Vrededorp (Johannesburg) "shall not permit any Asiatic, native or coloured person (other than the bona fide servant of a white person for the time being residing upon the stand) to reside on or occupy the stand, or any part thereof." In the above enactment the words "to occupy," construed with regard to the purpose for

(1) (1872), LR 8 Exch 8.

(2) [1922] 1 AC 500.



which it is used as appearing in the Act, and the context, mean to be physically present for a substantial period of time, and do not mean to have legal possession in a technical sense. Consequently the enactment is infringed if the owner of a stand lets it to a limited company, whose Asiatic manager and employees, with the owner's knowledge and permission, carry on business there.'

The passage to which I refer is where VISCOUNT CAVE said:

'The word "occupy" is a word of uncertain meaning. Sometimes it denotes legal possession in the technical sense, as when occupation is made the test of rateability; and it is in this sense that it is said in the rating cases that the occupation of premises by a servant, if such occupation is subservient and necessary to the service, is the occupation of his master: *R v Spurrell* (1). At other times "occupation" denotes nothing more than physical presence in a place for a substantial period of time, as where a person is said to occupy a seat or pew, or where a person who allows his horses or cattle to be in a field or to pass along a highway, is said to be the occupier of the field or highway for the purpose of s. 68 of the Railway Clauses Act 1845: *Dawson v Midland Ry. Co.* (2); *Luscombe v Great Western Ry. Co.* (3). Its precise meaning in any particular statute or document must depend on the purpose for which, and the context in which, it is used. In the present case it appears reasonably clear that the word is used in the second or more popular sense above described.'

Authority on s 45 apart, I consider that licensees are capable of being occupiers in appropriate circumstances, and I would hold the caravan dwellers with whom I am concerned in this case to have been occupiers at the time when the enforcement notice was served.

It is, however, suggested by counsel for the defendants that there is authority to the contrary, and I was referred to *Munnich v Godstone Rural District Council* (4). Part of the headnote to that case is as follows:

'In 1958 the plaintiff and one T. purchased one and a half acres of land having on it a bungalow, and by January, 1960, had allowed four individuals to stand caravans on the land and to live in them. On March 14, 1960, the local planning authority served enforcement notices under section 23 of the Town and Country Planning Act, 1947, all of which were identical in the recital of complaint, viz., that development of land had been carried out without planning permission, namely, (i) using the land other than as land attached to the bungalow, and (ii) placing on it "a caravan used . . . as a dwelling," and identical in requirement, viz., to discontinue that use and remove "the said caravan thereon". A schedule and plan attached to each notice referred to the whole one and a half acres. All the notices named the plaintiff and T. as "owners"; one copy was addressed to and served on each of the caravan dwellers by name as "occupier"; and copies of the notices to the individual caravanners were also served on the co-owners, so that the plaintiff received four documents in all. The recipients paid no regard to the notices but on October 7, 1960, after the Caravan Sites and Control of Development Act, 1960, had come into force, the plaintiff applied to the local authority for a licence to use the land as a caravan site. No reply was received to that application . . . On June 25, 1962, he [i.e. the plaintiff] issued the writ in the present action asking for declarations, in effect, that, as no valid

(1) [1865], 36 JP 196; LR 1 QB 72.

(2) (1872), LR 8 Exch 8.

(3) [1899] 2 QB 313.

(4) [1966] 1 All ER 930.

enforcement notice had been issued in respect of an existing caravan site, he was entitled under the provisions of section 17 (3) of the Act of 1960 to "deemed" unconditional permission to use the land as a caravan site and to the issue of a site licence . . . On the trial of his action for declaratory relief, the local planning authority contended (a) that as valid enforcement notices had been served on the owners and occupiers of the land, section 17 (3) (b) effectively excluded the right to "deemed" planning permission, and (b) that as the plaintiff was asking the court to declare lawful that which had thrice been held by the appropriate criminal court to be a criminal offence, the action was an abuse of the process of the court and the court should not exercise its discretion to grant declaratory relief. . . . Held . . . (2) But that the declarations asked for would be refused, for the documents served by the local planning authority constituted valid enforcement notices served on the owners and occupiers of the land, for each told the recipient fairly what he had done wrong and what he had to do to remedy it, each was served on the owners who were also the occupiers of the whole land, and the caravan dwellers were not "occupiers" of the land but mere licensees, and the service of a notice on them was unnecessary.'

LORD DENNING MR said this:

'The next point is whether these documents were a valid enforcement notice. The judge was much impressed by the cases before 1960, in one of which it was said "that the Act . . . was highly technical and, as it encroached on private rights, the court must insist on strict and rigid adherence to formalities". So said VISCOUNT SIMONDS in *East Riding County Council v Park Estate (Bridlington), Ltd* (1). A good deal of water has flowed under the bridges since then. We found that many people were taking an undue advantage of that statement. Formalities were being used to defeat the public good. So we no longer favour them. *Miller-Mead v Minister of Housing and Local Government, Same v Same* (2) was the turning point. We now reject technicalities and apply the simple test enunciated by UPJOHN, L.J., in that case, "does the notice tell him fairly what he has done wrong and what he must do to remedy it?". Applying that test, it is plain that the plaintiff and Mr. Taras, who were the "owners" of the land, and, as I think, also the "occupiers" of the land, got full and proper notice of what was complained of, namely, that these four caravans had been brought on the site without permission. They had the four documents with the names of the caravan dwellers on them telling them what ought to be done, namely, remove those caravans from the land. I can see no difficulty whatever in holding that all four documents, coupled together and served together, constituted a perfectly valid enforcement notice. I know that Mr. Mould, Mr. Billingham, Mr. Ware and Mr. Murray were described as "occupiers". That was erroneous. They were not occupiers within the meaning of the Act. They were simply caravan dwellers. Caravan dwellers are only licensees and are never to be regarded as occupiers unless they are granted a tenancy. It was unnecessary to serve them at all. The only persons who needed to be served were the plaintiff and Mr. Taras themselves. Those two had the clearest possible notice of what was complained of and what they ought to do to remedy it. On this short and simple ground I think this enforcement notice was good and always has been good. Even if it were necessary to describe these caravan dwellers as occupiers and to serve them, I think that sufficient notice was given to them.'

Counsel for the defendants naturally fastens on the sentence 'caravan dwellers are

(1) 120 JP 380; [1956] 2 All ER 669; [1957] AC 223.

(2) 127 JP 122; [1963] 1 All ER 459; [1963] 2 QB 196.

only licensees and are never to be regarded as occupiers unless they are granted a tenancy'. But DANCKWERTS and SALMON LJ, while concurring in the view that the caravan dwellers in that case were licensees and not occupiers, were more guarded in their observations. DANCKWERTS LJ said this:

'In most cases, where persons are permitted to place caravans on land belonging to the owner, the owners of the caravans are not occupiers in the ordinary sense of the word, although it is possible that they may be occupiers in certain special circumstances. I remember a case in which I was concerned in which the land contained very permanent standings for the purpose of caravans being let out by the owner of the land, and, according to my recollection, the persons who hired the caravans were treated as tenants, when I suppose they might become occupiers. In the present case, however, where it appears that there is a more or less shifting population with regard to the caravans which were brought on to the site and belonged to the persons who came, I think that it is quite plain that in no sense of the word were the four persons mentioned in this case anything but licensees and, therefore, that they were not occupiers. Consequently, under the provisions of the Act of 1960 with which we are dealing, there appears to have been no necessity whatever to serve any notice on those caravan owners, and it appears that the only persons who were occupiers were the two owners of the site.'

Then SALMON LJ said this:

'As to the point that the notice has not been served on the occupiers, I agree with my lords that it is not shown here that Mr. Mould, Mr. Billingham, Mr. Ware or Mr. Murray had anything but a licence to bring a caravan onto the land and live in it for the time being. It is not shown that they were occupiers within the meaning of that word in s. 23 (1) of the Act of 1947. It certainly is not necessary to attempt to define the meaning of the word "occupier" as used in that Act, and I shall not attempt to do so. As DANCKWERTS, L.J., has said, there may well be cases where those dwelling in caravans are occupiers. Here the evidence does not establish that any of these men was an occupier. The plaintiff and Mr. Taras were the owners and occupiers; they were the only persons that need be served and they were served. The fact that, on the face of the notice, they are not described as occupiers but only as owners makes no difference since they are in fact the occupiers.'

In my judgment the decision in that case is really only a decision on the facts. I do not read it as a decision that in no circumstances can licensees be occupiers for the purposes of s 45, and LORD DENNING MR's dictum to the contrary is I think obiter. SALMON LJ was of the opinion that there might well be cases where those dwelling in caravans were occupiers. He does not confine this to cases where they are tenants, nor, I think does DANCKWERTS LJ who referred to a case where caravan dwellers were 'treated as tenants'. In my judgment the case does not preclude me from holding, as I do, that Mr Wicks and Mr Cousins, to take two examples, were occupiers for the purposes of s 45 (3) of the Act of 1962.

I should add that counsel for the plaintiff drew attention to the fact that in 1968 the defendants, as the rating authority, made proposals for an alteration of the valuation list by rating the individual caravan owners. But quite apart from the fact that this was some three years after the events with which I am concerned, a different body of legislation is involved and I doubt whether the defendants' rating proposals carry the matter any further.

In these circumstances the question of estoppel does not arise. But I should mention that the defendants called no evidence in support of their plea that they acted

in reliance on the plaintiff's representations; in fact they called no evidence at all. Their submission was that it was a fair inference from certain correspondence and documents that they did so act and their case was based on that inference. Counsel for the plaintiff submitted that the true inference is to the contrary and put forward a number of other arguments for there being no estoppel, including the submission, based on *Swallow and Pearson v Middlesex County Council* (1) that this is a field in which the doctrine does not in any case operate. But it is unnecessary for me to decide these matters, and I know of no additional facts which I ought to find to enable the question of estoppel to be decided should the case go further and the question become relevant.

I propose to make a declaration that the enforcement notice is invalid and of no effect.

*Declaration accordingly.*

Solicitors: *James & Charles Dodd; Herbert Smith & Co.*

P.P.

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QUEEN'S BENCH DIVISION

(CUSACK J)

1st, 2nd, 3rd, 4th, 5th March 1971

GORSE AND ANOTHER v DURHAM COUNTY COUNCIL AND ANOTHER

*Education—Teacher—Contract of employment—Refusal to obey order—Right of authority to repudiate contract—Non-observance of regulations regarding dismissal and suspension.*

An education authority employed in its schools teachers the conditions of whose employment as regards termination of their contracts and suspension in the event of misconduct was subject to certain rules of management and a scheme of administration.

Per CUSACK, J: the contracts into which teachers had entered were contracts of employment to which the general rule of master and servant applied, and if a teacher by wilful disobedience to a lawful and reasonable order showed a determination to disregard an essential term of his contract, that might amount to a repudiation of the contract entitling the authority to elect to treat the contract at an end although the procedure under the rules and scheme of management had not been observed.

ACTION by Leslie Gorse and Gail Murray, claiming arrears of salary due to them under their contracts with the first defendants, Durham County Council, and the second defendants, Easington Rural District Council, for the period between 27th November and 1st December 1967. Alternatively they claimed damages for breach of contract.

*E L Gardner QC and C W L Willson for the plaintiffs.*

*F H B W Layfield QC and J R Johnson for the defendant councils.*

*Cur adv vult*

**CUSACK J:** At all material times the plaintiffs in this action were school-teachers in the service of the Durham County Council. For three and a half days between 27th November 1967 and 1st December 1967 the plaintiffs, in circumstances to which I shall refer later, did not in fact attend at their respective schools or carry out

(1) 117 JP 179; [1953] 1 All ER 580.

any duties there. The plaintiffs have not been paid for those three and a half days, and in this action they seek to recover the salaries which they say accrued due, and they also seek other relief in the form of declarations. In terms of money the first plaintiff's claim, as shown in his statement of claim, which was delivered before decimalisation, is for £17 12s, and the second plaintiff's claim is for £7 16s 10d. These sums of money do not indicate the significance of the action, as the result may affect a number of other schoolteachers, and it is therefore regarded as a test case. In the county of Durham the first defendants, the Durham County Council, are and were at all material times the local education authority. The Easington Rural District Council, who are the second defendants, are within the county of Durham, and became in 1963 what is known as an 'excepted district' within the meaning of the Education Act 1944. That means that for educational purposes they have their own scheme of divisional administration and certain powers delegated by the local education authority.

Under the terms of an agreement dated 25th June 1962 the first plaintiff, Mr Leslie Gorse, was appointed an assistant master at the Peterlee Grammar Technical School. His agreement was made with the Durham County Education Committee acting under the powers delegated by the Durham County Council as local education authority. Under the terms of an agreement dated 22nd May 1967 the second plaintiff Miss Gail Murray, was appointed an assistant mistress at the Peterlee Howletch Lane County Junior Mixed School. Her agreement was with the Easington Rural District Council, acting under their delegated powers. Both schools were in fact in the Easington Excepted District. I pause here to say that there was an issue on the pleadings as to the extent to which, in the circumstances of this case, the rural district council could act as the agent of the county council, but the point has been abandoned and nothing now turns on it. With regard to the agreements, they are for all practical purposes in identical terms. Clause 6 of the agreement in each case provides:

'The teacher agrees to serve as assistant master/mistress under the immediate directions of the head master/mistress and in accordance with (a) the provisions of the Education Act, 1944, and any amending Act (b) the conditions of employment prescribed in the regulations made there under by the Minister, (c) the regulations of the committee in force from time to time, and (d) the rules of management or articles of government in force for the school. In the case of Miss Murray there was an additional provision in accordance with the Easington Scheme of Divisional Administration.'

The relevant instruments are the Easington Rural District Council Scheme of Divisional Administration in the first place, secondly, the Instrument of Government for the Peterlee multilateral unit, which included the first plaintiff's school (the instrument includes articles of government), and, thirdly, the Instrument of Management of County Primary Schools for the Easington Excepted District. That was the relevant instrument for the second defendant's school, and the instrument included rules of management. The scheme of divisional administration provides by art 49:

'Subject to the rules of management or articles of government in the case of a teacher, the council may suspend an officer (including a teacher) from his office for misconduct or other urgent cause.'

Article 50 deals with the powers of dismissal, and art 51 deals with the right of appeal against dismissal. The articles of government deal with the procedure for the dismissal of an assistant teacher and the rules of management make brief reference to the

dismissal and suspension of assistant teachers. Clause 8 of the contract entered into by the plaintiffs provides for a determination on three months' notice in writing. Clause 10 provides:

'Before any decision is taken by the committee to terminate this agreement as provided in cl 8, the teacher shall have the right of a personal hearing (with the assistance of a friend if he/she desires) in accordance with the regulations of the committee.'

Clause 11 provides that the district education officer in the one case, and the director of education in the other

'shall have power to suspend the teacher from the performance of all duties connected with the school for misconduct or other good and urgent cause but shall at once make a full report to the council and the committee. The suspended teacher shall have the right of a personal hearing (with the assistance of a friend if he/she desires) at any meeting of the council and the committee at which the confirmation or otherwise of his/her suspension is to be considered and shall be given not less than seven day's notice of such meeting. If the teacher be re-instated he/she shall not suffer any loss of salary during the period of suspension, and if he/she be not reinstated he/she shall be deemed to have been dismissed for misconduct or for good and urgent cause as at the date of suspension and it shall be in the discretion of the council or the committee either to pay or withhold salary for the period of suspension.'

I have in fact been reading from the agreement applicable to the second plaintiff. There are slight variations of wording in the case of the first plaintiff, because his contract was with the county council, but for all material purposes, as I have indicated, the provisions are identical in their effect. The effect of all these provisions to which I have referred is to ensure that no teacher shall have his agreement determined on notice or be dismissed or be suspended without an opportunity of being heard. Moreover, a teacher who is reinstated after suspension suffers no loss of salary.

Section 49 of the Education Act 1944 gave the Secretary of State power to make regulations with regard to the provision of milk and meals in schools. The Secretary of State did make such regulations, and they are entitled the Provision of Milk and Meals Regulations 1945. Regulation 14 of those regulations provides:

'The authority shall ensure that suitable arrangements are made for the supervision and social training of pupils during meals and may require teachers of any school to supervise pupils partaking of dinners upon days on which the school is open for instruction . . .'

There are then certain provisos which are of no relevance. It is worth noticing, with regard to that reg 14, that the authority shall—and I stress the word 'shall'—ensure that suitable arrangements are made, but may—and I stress the word 'may' because it is permissive—require teachers to supervise.

Before 1967 the question of requiring teachers to supervise meals had been the subject of much discussion between the various authorities concerned and the teachers' representatives, in particular, the National Union of Teachers, and it had indeed, it seems, been on the part of the teachers the subject of some resentment. Negotiations and discussions between the authorities and the teachers' representatives resulted in an understanding, reached in 1963, that teachers should assist in supervising but on a voluntary basis. In the year 1967, and possibly earlier, the National Union of Teachers, representing teachers, was pressing for reconsideration of salary scales and for salary increases. It was decided that the seriousness of the teachers'



claim and their determination should be demonstrated in such a way as to convince national and local authorities, as well as the public, that the matter needed attention. One of the ways in which it was decided to do this was for teachers in certain selected areas to refuse to continue the voluntary duty of supervising school meals. Certain areas were selected. I do not think it was on the first list, but Easington was eventually included.

From June 1967 the County Councils Association, acting in conjunction with the Association of Municipal Corporations, the Association of Education Committees and the Welsh Joint Education Committee, was aware of the possibility of action being taken in selected areas and was advising education authorities who were members of the bodies to which I have referred. Then on 7th November 1967 the secretary of the National Union of Teachers, Sir Ronald Gould, addressed a letter to the education officer at Easington. The letter was in the following terms:

'Dear Sir, Following the decisions of a Special Conference of the National Union of Teachers, I have to inform you that from Monday, 27th November 1967, members of the union serving in primary and secondary schools in the administrative area of Easington, will be instructed to withdraw from all duties or activities arising from the school meals service, including the supervision of pupils during the dinner break.'

As a result of that letter, and after discussion and consideration, a letter was addressed to all teachers in the Easington district. That letter was dated 21st November 1967 and was signed by the district education officer. It read:

'Dear Sir/Madam, Under regulation 14 of the Provision of Milk and Meals Regulations 1945 a local education authority may require teachers of any school to supervise pupils partaking of dinners upon days upon which the school is open for instruction. This is subject to the provisos that in the case of nursery schools or nursery classes, teachers may also be required to supervise pupils at meals other than dinners, that no teacher should be required to undertake supervision unless pupils in his or her own school are included among the pupils supervised, and that no service of supervision should be required of any teacher if, in the opinion of the local education authority, it would adversely affect the teaching given by that teacher. The local education authority required teachers to undertake this duty which is one which they must discharge under their contract of service. If you refuse to do so you will have in fact repudiated your contract and your attendance at school cannot be permitted until such time as you are prepared to carry out the whole of your duties and in the meantime no further salary will accrue to you.'

The last paragraph of that letter is particularly relevant because it refers to 'repudiation of contract', but it also states you 'cannot be permitted until such time as you are prepared to carry out the whole of your duties' to attend at school.

On 27th November 1967, the date forecast by the secretary of the National Union of Teachers, every teacher, including the plaintiffs, in the Easington area was interviewed. The interview was of a somewhat formal character because each interviewer had been provided by the county education officer with a typed document which set out the form which the interview was to take. The typed document read in this way:

'You have received a letter which stated that if it is your intention not to undertake school meals duties this action will constitute a repudiation of your contract and that, therefore, you will not be permitted to remain on school

premises and no salary will accrue. I am required by the education committee to ask you if you are prepared to undertake school meals duties today, Monday, 27th November, 1967, and/or any subsequent days.'

It was there intended that there should be a pause for an answer, and it was clearly expected that the answer would be 'No', because the typed document goes on, 'I must, therefore, inform you that (from mid-day today) you are not permitted to remain on the school premises'. The plaintiffs refused to give the promise required, but at the same time they made it perfectly clear—and this is not in dispute—that they were available for teaching duties as required. The order issued to them was issued in pursuance of the terms of reg 14. The matter had ceased to be on a voluntary basis, and there is no doubt that it was a lawful order. There is equally no doubt that they had refused a lawful order of the kind to which I have referred, which was made under the authority of Parliament. Both were accordingly informed that they were no longer permitted to remain on the school premises, and shortly thereafter, in company with other teachers, each left his or her particular school.

The plaintiffs were of course acting in accordance with instructions of the National Union of Teachers. They were not alone. The overwhelming majority of teachers at Easington made a similar refusal in the same way and with the same results to themselves, namely, that they were told they were not permitted to remain on the premises of their respective schools. Thereafter all the teachers, including the plaintiffs, received a letter dated 28th November 1967 which read in the following way:

'Dear Sir/Madam, As I think you must know your action in declining to supervise pupils partaking of dinners on days on which the school is open for instruction constitutes a unilateral election to perform only part of your duties. This breach of your contract of service is not acceptable to the [local education authority] and therefore in accordance with my letter of 21st. November, 1967, your attendance at school cannot be permitted until such time as you are prepared to carry out the whole of your duties. In the meantime no further salary will accrue to you. I hope you will find it possible to decide to undertake all the duties of your employment at an early date when you will be reinstated.'

On that very day a national agreement was reached, subject to confirmation I think by those ultimately concerned, which was an agreement enabling the National Union of Teachers to withdraw their instructions not to participate at school meals supervision. After a little delay in order to make sure that all the parties accepted the agreement the plaintiffs, together with other teachers in the Easington area, returned to school on 1st December 1967, but they have been refused payment for the three and a half days during which, in the circumstances which I have described, they were absent from school.

The defendant councils say that this refusal to pay the salary for three and a half days was justified because the plaintiffs, by their action of 27th November 1967, had repudiated their contracts and that they, i.e. the councils, had accepted such repudiation. The effect of this would be that for the three and a half days in question the plaintiffs and the defendant councils were not in any contractual relations at all, and that when the plaintiffs returned to duty they would have to be re-engaged by means of a new agreement in the same terms as their original agreement, or I suppose in different terms, if it was thought right. In fact no new agreement in writing was entered into, and the suggestion of such an agreement did not emerge as between the plaintiffs and the defendant councils until, long after the return to school, when it was referred to in correspondence between the first plaintiff and Mr Dormand, the district education officer, in the months of February and March 1968.

The plaintiffs say, first, that their conduct, viewed in its proper setting, did not amount to a repudiation. Secondly, they say that even if it did amount to a repudiation the defendant councils had no power to act on it without going through the prescribed procedure for terminating their employment, as set out in the agreements under which they were employed. Thirdly they say that what really happened is that they were suspended, but suspended without observing the required procedure, or observing subsequently the rule that payment of salary must be made for a period of suspension if that suspension is followed by reinstatement.

The contracts into which the plaintiffs had entered were contracts of employment to which the general rule of master and servant applied. If an employee by wilful disobedience to a lawful and reasonable order shows a determination to disregard an essential term of his contract then this may amount to a repudiation of the contract entitling the employer to elect to treat the contract as at an end. On the other hand, the employer may elect, if he so desires, to treat the contract as continuing and to take action, if necessary, in respect of a breach of that contract. The type of conduct which can amount to a repudiation must necessarily depend on the circumstances of each individual case. It is a matter of fact and a matter of degree. It must be related to the situation at the time and the particular situation of those personalities involved.

In the present case the duty of supervising school meals was one which the plaintiffs had, until November 1967, carried out as a normal part of their duties. Indeed, it was their expectation that they would be participating in the duty of supervising meals. The process of education is not confined to teaching in the classroom. Regulation 14 refers not only to supervision but the social training of pupils during meals. That some supervision is required for purposes of discipline, order and safety is obvious, although the amount of supervision necessary may perhaps depend on the age of the pupils concerned. It is true that part of the duty of supervising meals can be carried out not by teachers but by what are called ancillary workers, but the presence of teachers is still needed, and ancillary workers cannot be recruited at short notice or trained rapidly. The National Union of Teachers itself had pointed out and warned in a document sent to the plaintiffs that a withdrawal from the supervision of school meals might mean that the life of the schools would not emerge unscathed. Moreover, the plaintiffs knew, or ought to have known, that the action they took, taken as it was in concert with others, would mean closing the majority of schools in the Easington district.

When they took the action which they did on 27th November it was not known for how long their refusal to supervise school meals would last, and accordingly it was not known for how long it would be necessary to close the schools, either until such time as they returned or until such time as other arrangements could be made. In fact about 422 teachers made the same refusal as the plaintiffs, out of a total of about 493 full time teachers and 78 part-time teachers. Forty-four schools had to close, including the second plaintiff's school, but the school at which the first plaintiff was a teacher did not have to close, perhaps because there were senior boys there capable of acting as monitors, and because the majority of the teachers at that school were not members of the National Union of Teachers.

The effect of the action taken by the plaintiffs, in conjunction with their colleagues whose actions they were entirely aware of, was to disrupt the education service for what was then to be regarded as an indefinite period. The plaintiffs took the action deliberately, after ample time for reflection, and with a full understanding of the probable consequences to the education service. Short of actually refusing to teach they could hardly have participated in any enterprise more fundamentally at variance with their lawful obligations. They were not only refusing a lawful order, but a lawful order which to their knowledge was not a triviality, but one, disobedience to

which would have serious consequences. Indeed, it was the object of the withdrawal from supervising school meals to cause harm and disruption, otherwise it would have served no purpose in drawing attention to the teachers' claim or in achieving the objective which they desired. I have no doubt at all that this was conduct which amounted to a direct repudiation of their agreements, and this being so, it would normally be open to the defendant councils to accept the repudiation and to regard the contracts as at an end.

It is, however, submitted on behalf of the plaintiffs that such a course was not open to the councils. The submission is that the councils, being the creatures of statute, could adopt only one of those courses specifically prescribed by statute or permitted by the rules and regulations which had been made by statutory authority. I agree that if the councils had elected to follow one of those courses they would have been obliged to observe the statutory procedure, but unless there is some specific prohibition, either in the statutes, the rules or the regulations, or in the individual contracts, I cannot accept that they are precluded from applying the ordinary law of the land and acting on a repudiation, if such a repudiation is made. No authority to the contrary has been cited. *Hannam v Bradford City Council* (1) is of no assistance, because the question of repudiation did not there arise as an issue at the trial and was not considered by the Court of Appeal. I should mention here that I have been referred, very helpfully, during the course of this trial to a number of authorities on various aspects of the case. There are really no authorities directly in point, and those to which I have been referred deal with general principles. As I say, I found them helpful, and I am obliged to counsel for referring me to them. If I do not actually cite them or refer to them in the course of this judgment it does not mean that I have overlooked them, but it is simply because they dealt with generalities rather than with the particular circumstances of this case\*.

To return to the situation as it was on 27th November 1967, it is my opinion that it was open to the defendant councils to act on the plaintiffs' repudiation if they so desired, and it was not open to the plaintiffs, having repudiated their contracts, to claim that the procedure prescribed by those contracts and the rules incorporated therein had to be observed before their engagement could be validly terminated. The question, however, remains: Did the councils act on the repudiation? This is really the crux of the case. It cannot be decided merely by looking at the vocabulary used in the course of the various exchanges between those concerned. The reality of the situation must be regarded. This requires some enquiry into the sequence of events.

As early as 7th June 1967 the County Councils Association and the bodies acting jointly with the County Councils Association had written to the clerks to county councils and chief education officers stating, *inter alia*, that where a teacher had

(1) 134 JP 588; [1970] 2 All ER 690.

\**Bird v British Celanese Ltd* [1945] 1 All ER 488, [1945] KB 336

*Boston Deep Sea Fishing & Ice Co v Ansell* (1888), 39 Ch D 339, [1886-90] All ER Rep 65.

*Clouston & Co Ltd v Corry* [1906] AC 222; [1904-07] All ER Rep 685.

*General Billposting Co Ltd v Atkinson* [1909] AC 118; [1908-10] All ER Rep 619.

*Henley v Pease & Partners Ltd* [1915] 1 KB 698; [1914-15] All ER Rep 984.

*Heyman v Darwins Ltd* [1942] 1 All ER 337, [1942] AC 356.

*Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285.

*Marshall v English Electric Co Ltd* [1945] 1 All ER 653.

*Pepper v Webb* [1969] 2 All ER 216.

*Price v Sunderland Corp* [1956] 3 All ER 153.

*Suisse Atlantique Société D'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1966] 2

All ER 61, [1967] AC 361.

*Wallwork v Fielding* [1922] 2 GB 66; [1922] All E R Rep 298.

refused to carry out any duty imposed on him, and this was in connection with the question of supervising meals, there was, in the view of the association, no alternative but to arrange for his immediate suspension without pay. It is right to say that later, on 22nd November 1967, when matters had advanced very much further and a good deal of action had been taken, some modification was made to that letter, and it was stated that the authorities might be best advised to regard wilful refusal as a breach of contract entitling the authority to terminate the contract.

In the meantime there had, as one might expect, been, very properly, a good deal of discussion in the committees concerned among the persons responsible, about the question of suspension. A meeting of a special sub-committee appointed to deal with the situation by the Durham County Council was held on 14th November 1967. Mr Metcalfe, the director of education, was present, and drew attention to the interpretation of the word 'suspend' which had been recorded. The minutes of that meeting record:

'The director drew attention to the interpretation of the word "suspend", stating that if a teacher is suspended and then ultimately reinstated, salary would be payable from the date of suspension and asked whether this was the term which the committee desired to use.'

Apparently no decision was taken, because the minute goes on to record: 'It was thought that some lead may come from the meeting in London on 17th November, 1967.' That was a meeting of the County Councils Association and the other bodies to which I have referred.

On the morning of 20th November 1967 the Easington education committee held a meeting. At that meeting a recommendation was made reading, insofar as the relevant part is concerned, in this way:

'RECOMMENDED that having regard to the resolution passed at the representative meeting of authorities (a) the attention of teachers be drawn to the position which will arise if a teacher refuses to undertake the supervision of school meals; (b) any teacher refusing to undertake the supervision of school meals be suspended and no salary accrue to the teacher as from the date of suspension.'

On the afternoon of the same day the county council sub-committee held a meeting, at which the chairman pointed out that while the word 'suspend' had in the past been used, failure to comply on the part of the teachers would be deemed to be a repudiation of their contracts. A recommendation was then carried that those who refused to undertake school meals duties should be excluded as from the time of that refusal to carry out those duties. The word 'excluded' is particularly to be noticed.

The clerk of the Easington Rural District Council, Mr Conyers-Kelly, who was also the legal adviser to the Easington education committee, had not attended the morning meeting at Easington. Mr Wood, a member of the committee who gave evidence and who thought that Mr Conyers-Kelly did attend that meeting, I am afraid has got in a muddle about that and is mistaken. Mr Conyers-Kelly did attend the afternoon meeting of the county committee. He did so at the request of Mr Dormand, the district education officer at Easington. I accept Mr Kelly's evidence that when he set out for that county council meeting at Durham he was poorly briefed, and that it was not until after the meeting, at which he was an observer rather than a participant, that he had seen all the papers concerning the matter, thereby becoming much more fully informed. One of the things which he discovered was the draft minutes of the Easington meeting of 20th November, showing the Easington resolution about suspension. Mr Conyers-Kelly immediately recognised the peril, so on 28th November he attended part of the meeting of the Easington committee when this particular



matter was to be dealt with, and he gave advice which led to the draft minutes being altered so that in its final printed form the recommendation, instead of referring to teachers being suspended read in this form:

'Any teacher refusing to undertake the supervision of school meals be excluded and no salary accrue to the teacher as from the date of exclusion.'

In the interval between 20th and 28th November another meeting of the Easington committee had been held at which, having heard a report from Mr Dormand of the meeting of the county councils' sub-committee on 20th November, it was recommended that teachers be excluded from school on refusal to undertake the supervision of school meals.

Now, there are two possibilities: first, that what was originally contemplated by the defendant councils was not suspension in its strict sense at all, and that the word 'suspension' or 'suspend' was used inaccurately to describe quite a different intention on their part. The second possibility is that what was intended was suspension, and that when the consequences were appreciated it was thought better to call it by some other name, in the hope that it would not be recognised for what it truly was.

Mr Wood, the member of the Easington committee to whom I have referred, I thought was engagingly frank and may have let the cat out of the bag when he said that his understanding was that words were devised to have the same effect as suspension but to avoid having to pay salary. If one refers again to the last paragraph of the letter of 21st November 1967 addressed to the teachers, the words are worthy of further consideration:

'If you refuse to do so you will have in fact repudiated your contract and your attendance at school cannot be permitted until such time as you are prepared to carry out the whole of your duties and in the meantime no further salary will accrue to you.'

There is no clear statement there that the contract is going to be regarded as terminated. If one refers to the last paragraph of the letter of 28th November 1967, which it will be remembered was issued after the teachers had made their decision, it again is worthy of consideration because it reads:

'I hope you will find it possible to decide to undertake all the duties of your employment at an early date when you will be re-instated.'

It is not of course conclusive by any means, but it is not without interest that that word 'reinstated' is the very word used in para 11 of the plaintiff's individual contracts when reference is being made to what happens when a teacher is suspended and suspension is not upheld.

Mr Metcalfe, the county director of education, told me that if a teacher who had been, to use the current word, 'excluded' later said that he would undertake the supervision of meals it was not really the contemplation that he should be told that he could not come back, and clearly it was not in contemplation that the terms of his service should be in any way revised. The truth of the matter is that neither side intended any final rupture in their relations. I have not overlooked the fact that the first plaintiff in his evidence told me that when he received the letter containing the word 'repudiation' (i.e. the letter of 21st November) he interpreted that as meaning that he might be 'sacking' himself if he took the action which it was intended to take. So he might be, but only if the first defendant council accepted that he had sacked himself, and this is only a more colloquial way of describing the process of repudiation and the acceptance of repudiation.



It is not entirely irrelevant, when one seeks to piece together the true situation, to refer to a certain part of the Schools Regulations 1959. Paragraph 4 of Sch 2 to these regulations provides:

'If a teacher's engagement is terminated, whether by dismissal or resignation, on account of misconduct, grave professional default or conviction of a criminal offence, the facts shall be reported to the Minister.'

Neither Mr Metcalfe nor Mr Dormand had any knowledge of such a report being made to the Minister with regard to the plaintiffs. Mr Dormand did not regard it as applicable. It seems to me that the wording is clear, that the reference to misconduct is unqualified, and if the behaviour of the plaintiffs was such that it amounted to a repudiation of their contracts then that must be misconduct and must be a matter which should have been reported to the Minister if it led to the termination of their engagement. This throws light on the defendant councils' intentions.

I do not think it necessary for me to deal further with the documents or the oral evidence. My finding is that the defendant councils did not act on the repudiation by the plaintiffs of their agreements. The evidence convinces me that at the material time the councils did not regard the agreements as at an end, but merely regarded individuals as temporarily excluded, a wording which in the circumstances it is impossible, as Mr Metcalfe himself found in the witness box, to distinguish from being suspended. It merely begs the question to say that it could not be suspension because the proper machinery for suspension was not observed. The fact is that it was suspension, but the suspension procedure was not used. No doubt it would have been most inconvenient administratively, but that is not the point. What the councils desired to do was to suspend the plaintiffs, and indeed the others involved, without the necessity of restoring their salaries on reinstatement. It may be that it was hoped that thereby the threat of loss of salary would either act as a deterrent to action being taken, or perhaps if action were taken, that it would secure a more speedy return of those who had taken the action. There is, therefore, no valid ground on which the plaintiffs can be deprived of their salaries for the three and a half days when they were excluded, and they are accordingly entitled to succeed in this action.

*Orders accordingly.*

Solicitors: K Wormald; Sharpe, Pritchard & Co, for J T Brockbank, Durham.

G.F.L.B.

**QUEENS BENCH DIVISION**

(BEFORE LORD PARKER, CJ, MELFORD STEVENSON AND COOKE, JJ)

16th February 1971

BRITISH ROAD SERVICES LTD AND ANOTHER v OWEN

*Road Traffic—Articulated vehicle with trailer—Use for unsuitable purpose—Unsuitability for load on route chosen—Motor Vehicles (Construction and Use) Regulations, 1969 (SI 1969, No 321), reg 76 (3).*

The driver of an articulated vehicle owned by the appellant company collided with and damaged a footbridge. The vehicle at the time was drawing a trailer loaded with two forklifts, which reached to a height of 17ft. 3in. above the road. The bridge was 16ft. 9in. high. The appellant company and the driver were charged with using a trailer drawn by a motor vehicle on a road for a purpose for which it was so unsuitable as to cause or to be likely to cause danger to any person on the road, contrary to reg 76 (3) of the Motor Vehicles (Construction and Use) Regulations, 1969. The justices found that the vehicle and trailer were mechanically sound, that the load was securely fixed to the trailer and was stable, but that the trailer was unsuitable for the purpose for which it was used on the route chosen. They convicted and fined the appellant company and driver who both appealed to the Divisional Court.

**HELD:** dismissing the appeals, that on the correct construction of reg 76 (3) regard must be had to the nature and features of the route chosen, and that the question of the suitability of the vehicle could not be decided without having regard to those matters and by confining consideration to the time when the vehicle set out on its journey; and that in the present case the vehicle had become unsuitable within the meaning of the regulations at the time when it approached the bridge, and that, accordingly, the convictions were right.

CASE STATED by justices of the city of Gloucester.

On 23rd June 1970 informations were preferred by the respondent, Leonard Cecil Owen, a police officer, against the first-named appellants, British Road Services Ltd, and the second-named appellant, David Patrick Hopper, a driver, in that they on 26th April 1970 at the parish of Gloucester, did use on a certain road called Cole Avenue a trailer, drawn by a motor vehicle, for a purpose for which it was so unsuitable as to cause danger or be likely to cause danger to a person on the road contrary to reg 76 (3) of the Motor Vehicles (Construction and Use) Regulations 1969 and s 64 (2) of the Road Traffic Act 1960, as amended.

The justices were of the opinion that the trailer was unsuitable for the purpose for which it was used and accordingly convicted both the company and driver and ordered them to pay fines of £25 and £15 respectively together with costs of £7 16s to be paid by the company and the driver. The company and the driver appealed.

R M Yorke for the appellants.

P J Crawford for the respondent.

**MELFORD STEVENSON J:** This is an appeal by way of Case Stated by British Road Services and one Hopper, a driver employed by the company, against the conviction of each of them on two informations alleging that they used on a road called Cole Avenue a trailer drawn by a motor vehicle for a purpose for which it was so unsuitable as to cause danger or be likely to cause danger to a person on the road contrary to reg 76 (3) of the Motor Vehicles (Construction and Use) Regulations 1969, made under s 64 (2) of the Road Traffic Act 1960.

The journey on which the vehicle in question embarked was a journey from Avonmouth in a northerly direction. The vehicle consisted of a tractor unit and a

flatbed trailer owned by the company. The trailer was loaded with two forklifts called Shorland Little Giant forklifts, one behind the other. It was, therefore, an articulated vehicle of the kind commonly used by the company for the carriage of this kind of load. On 26th April the driver drove this vehicle on to the Gloucester ringroad, and at Cole Avenue encountered a pedestrian footbridge on which no height was marked. The minimum headroom clearance for every part of the carriageway of a public road, at any rate in this area, is 16 feet 6 inches, and only bridges below this height are marked. On passing or attempting to pass under the footbridge, the rearmost forklift truck struck the bridge and severely damaged it. The bridge was at a height of 16 feet 9 inches from the road surface. The height of the bed of the trailer from the road was 4 feet 9 inches. The maximum height of the rearmost forklift was 12 feet 6 inches, so that the overall height of vehicle and load was 17 feet 3 inches, an excess of 6 inches over the height of the footbridge above the road. There is a finding that the unit and trailer were mechanically sound and in good condition and that the load was securely fixed to the trailer and was stable.

These summonses were brought under reg 76 (3) of the 1969 regulations, which provides:

'No motor vehicle or trailer shall be used for any purpose for which it is so unsuitable as to cause or be likely to cause danger to any person in or on the vehicle or trailer or on a road.'

It is said on behalf of the appellants that this articulated vehicle, including the trailer and its load, was to be looked at at the start of its journey, and that at that time it was in fact being used for a purpose for which it was suitable. The way in which it is put is that the driver, when approaching this bridge, could and no doubt should have observed that the bridge was at a height which would make it impossible or difficult for the load to pass beneath it; he may well have been guilty of careless driving in attempting to negotiate the bridge, but that fact, if fact it be, does not render the vehicle or trailer unsuitable so as to cause or be likely to cause danger to any persons in or on the vehicle or trailer on a road. Reliance is placed in support of that argument on the language of *WINN LJ in Hollis Brothers Ltd v Bailey, Buttwell v Bailey* (1), where he observed:

'I think the proper moment to consider the question is when it [i.e. the vehicle] set out to be used on the relevant occasion—was unsuitable for the purpose, meaning no more than the use to which it was then being put.'

The contrary view, which has been presented by counsel for the respondent, I think can be accurately summarised by saying that the nature of the route which the vehicle is intended to follow is relevant in assessing the suitability of the vehicle for the purpose for which it is going to be used, and if full effect is to be given to the word 'purpose' in its context in this regulation, regard must be had to the nature and features of that route, and it is impossible to consider the suitability of the vehicle without having regard to those matters.

If that is right, and I am disposed to think it is, then it seems to me that the offences here charged were made out in that this motor vehicle including the trailer was used for a purpose for which it was so unsuitable as to cause or be likely to cause danger to any person in or on the vehicle or trailer or on a road. One has, I think, to include in the consideration of the vehicle and the suitability of the vehicle, the time when the vehicle approaches the bridge which it hit when the driver, at least, had the opportunity of observing what was likely to happen if he tried to pass under the

(1) [1968] 1 WLR 663.

bridge which in fact made it impracticable for him to follow the route which he was trying to use to get to his destination.

In those circumstances, and if that is the right view, then the proper course here is to dismiss this appeal.

**COOKE J:** I agree, and I would only add one word because I was a party to the decision in *Hollis Brothers Ltd v Bailey* (1). It is perfectly true that in that case WINN LJ indicated a view that the proper moment to consider the question whether the vehicle was suitable for a particular purpose was when the vehicle was about to set out on its journey. That undoubtedly was the convenient way of applying the test in that particular case, for reasons peculiar to that case into which it is unnecessary to enter here. But I am quite clear that WINN LJ was not intending to lay down a universal rule that the test is to be applied only when the vehicle is about to set out on its journey.

**LORD PARKER CJ:** I also agree. It seems to me impossible to read the word 'purpose' as not including the load and the journey. In my judgment, the sole question here is: At what time does one judge suitability? If one judges suitability at the commencement of the journey, then I would agree with counsel for the appellants' argument that no one at that stage can tell what route exactly the journey will take. On the other hand, if as I think, and I agree with MELFORD STEVENSON and COOKE JJ in this, one judges the matter at every point, as it were, of the journey itself, then it seems to me that the moment when the trailer with its load approached the bridge in question, a bridge which is no more than 16 feet 9 inches high, then immediately it is unsuitable for the purpose of carrying that load under that bridge. I would dismiss this appeal.

*Appeal dismissed.*

Solicitors: *Hextall, Erskine & Co*, for Cartwright, Taylor & Corpe, Bristol; *Gibson & Weldon*, for Keith Scott & Co, Gloucester.

T.R.F.B.

(1) [1968] 1 WLR 663.

COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW, LJ, SHAW AND BEAN, JJ)

March 16th 1971

R v STEWART

*Criminal Law—Sentence—Extended term of imprisonment—Propriety of term starting on expiration of ordinary sentence of imprisonment.*

There is no reason in principle why an extended term of imprisonment should not be passed so as to commence at the expiration of an existing ordinary term of imprisonment.

APPEAL by Ronald Stewart against a sentence, passed on him at Cumberland Quarter Sessions after he had pleaded guilty to a charge of going equipped for burglary, of two years' imprisonment, certified as being an extended sentence, to begin to run at the expiration of a sentence of two years' imprisonment which he was then serving.

R G Booth for the appellant.

The Crown was not represented.

MEGAW LJ delivered this judgment of the court: On 2nd October 1970, at Cumberland Quarter Sessions, the appellant pleaded guilty to the offence of going equipped for burglary. He was sentenced to two years' imprisonment which was certified as being an extended term, to begin to run at the expiration of a sentence which he was then serving. That sentence was a sentence of two years' imprisonment which had been passed on him at Hull City Quarter Sessions on 5th August 1970 on two charges of burglary and theft.

The appellant is 26 years of age. He has a bad record which began in 1962 with Borstal training. Then in 1964 for robbery with aggravation he was sentenced to two years' imprisonment. At Northumberland Quarter Sessions in 1966 for larceny of copper cable he was given a chance by being put on probation for two years, but shortly after for shopbreaking with intent he was sentenced to six months' imprisonment. At Leeds Assizes in 1967 for burglary, which involved stealing two safes, he was sentenced to three years' imprisonment. Subsequently, for receiving property and other offences he was sentenced to two years' imprisonment, and then there were the offences for which he was dealt with at Hull City Quarter Sessions in August 1970, and sentenced to two years' imprisonment to which his present sentence of two years extended has been made consecutive.

The single judge gave leave to appeal against sentence. It would seem, at any rate in part, that in giving that leave he was moved by the possibility that there might be practical problems if, as here, an extended term of imprisonment was made to run consecutive to an existing term of imprisonment. In *R v Wilkinson* (1) it was stated that it was wrong to impose an ordinary term of imprisonment to run at the expiration of an extended term. That is the converse case to this and there were obvious practical difficulties in that case. But in this, the converse case, this court, having investigated the matter, is quite satisfied that no such problems arise and there is no reason in principle why an extended term should not be made to run at the expiration of an existing ordinary term of imprisonment.

[His LORDSHIP then considered two grounds put forward on behalf of the appellant and concluded:] In all the circumstances this court is unable to see that there is any ground for altering the sentence, and the appeal against sentence is dismissed.

Solicitor: Registrar of Criminal Appeals.

*Appeal dismissed.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, CJ, WIDGERY LJ and COOKE J)

8th, 17th March 1971

R v JONES

*Criminal Law—Appeal—Application for leave—Instructions to solicitors—Disappearance of defendant during trial before conviction and sentence—Validity of notice—Criminal Appeal Rules, 1968, r 2 (5).*

In all but the most exceptional cases the proper time for an applicant to give, and for solicitors to receive, instructions to institute appeal proceedings is after conviction and sentence. Where a defendant has, by absconding in the course of his trial, put it out of his power to give such instructions at the proper time, the Court of Appeal will, as a general rule, take the view that his solicitors have not been duly authorised to prosecute appeal proceedings on his behalf and regard a notice of application for leave to appeal signed by the defendant's solicitors as invalid.

Rule 2 (5) of the Criminal Appeal Rules, 1968, which provides that a notice of appeal or application for leave to appeal may be signed by an applicant or on his behalf, has no application in such circumstances; the rule merely provides that the signature of an agent shall be acceptable if he was otherwise duly authorised.

APPLICATION for directions regarding a notice of application for leave to appeal against conviction and sentence made by the solicitors of Robert Edward Wynyard Jones who had been convicted and sentenced at the Central Criminal Court.

*John Lloyd-Eley QC and R Sturgess for the applicant.*  
*R D L Du Cann as amicus curiae.*

*Cur adv vult*

17th March. **COOKE J** read this judgment of the court. On 26th June 1970 the applicant appeared at the Central Criminal Court on two charges of conspiracy to defraud, one of theft and eight of fraudulent conversion.

The substance of the charges of conspiracy was that the applicant and his co-accused had conspired to induce owners of motor vehicles to part with those vehicles for sale, by means of false representations that a minimum agreed price would be secured for the owners or the vehicles would be returned to them. The substance of each of the charges of fraudulent conversion was that, having been entrusted with a motor vehicle on sale or return terms, the applicant converted the vehicle or the proceeds of it to his own use.

On 22nd July the prosecution closed their case and the trial judge then heard submissions of law on behalf of the applicant that there was no case to answer on the counts of fraudulent conversion. On 27th July the judge ruled against those submissions and on the same day the applicant informed his solicitors that, if convicted, he would wish to appeal on the ground that the submissions should have been upheld. On 28th July the applicant absconded. The trial proceeded in his absence, and on 5th August the time came when in the ordinary course of events counsel would have begun to present his defence. Counsel understandably took the view that it was impracticable to present the defence in the absence of the applicant, and an application was made to the judge to discharge the jury from returning verdicts on the charges against him. That application having been refused, the applicant's solicitors felt obliged to instruct counsel to withdraw from the case, and both counsel and the solicitors were thereupon excused by the court from taking further part in the proceedings. On 19th August 1970 the applicant was convicted on one of the conspiracy counts and on all eight counts of fraudulent conversion. On the conspiracy



count he was sentenced to five years' imprisonment and on each of the fraudulent conversion counts to three years' imprisonment, all concurrent. Those sentences were passed in his absence, and he has never since been apprehended.

Now on 13th November 1969 the South Western Magistrates' Court had granted legal aid to the applicant under ss 73 and 75 of the Criminal Justice Act 1967 for the following purposes:

'Proceedings before the Central Criminal Court in connection with trial.... including, in the event of his being convicted or sentenced in those proceedings, advice and assistance in regard to the making of an appeal to the Criminal Division of the Court of Appeal as provided in section 74 (7) of the Criminal Justice Act 1967.'

On 8th September 1970 a notice of application for leave to appeal against conviction and sentence and for legal aid was prepared and signed by the applicant's solicitors on his behalf without any instructions other than those which they had received before the applicant absconded. The notice was supported by grounds of appeal similarly signed. Among those grounds are the following:

'(1) The learned trial judge misdirected himself in refusing to discharge the jury and continuing the trial of the [applicant] when the [applicant] failed to attend the trial after the close of the case for the prosecution.

'(2) The learned trial judge misdirected himself in holding on submission at the close of the case for the prosecution that there was evidence to go before the jury on the counts of fraudulent conversion when the evidence had been that the cars referred to in the counts had been delivered to this appellant on sale or return.'

This court now has to determine, on an application for directions, whether the notice of application for leave to appeal is a valid notice. The question may be put in general form in this way: where in the course of a criminal trial the accused expresses to his solicitors a wish to appeal if convicted, and then absconds and is convicted in his absence, can his solicitors be regarded as properly authorised to prosecute an appeal on his behalf? The answer depends not only on a true appreciation of the relationship between the accused and his solicitors after he has absconded but also on considerations relating to the practice of this court. In approaching the question, we dismiss at the outset as irrelevant the fact that the legal aid granted to the applicant covered 'advice and assistance in regard to the making of an appeal to the Criminal Division of the Court of Appeal.' The fact that legal aid will be available for an application, if made, is of no assistance whatever in determining the prior question whether the application may properly be made at all.

In support of the validity of the application counsel for the applicant says that the inability of the solicitors to obtain instructions after the applicant had absconded did not determine the relationship of solicitor and client but merely prevented the solicitors from continuing to act at the trial. He relies on the fact that before absconding the applicant had expressed a wish to appeal, if convicted. He also relies on r 2 (5) of the Criminal Appeal Rules 1968. That paragraph provides that a notice of appeal or of application for leave to appeal may be signed by the appellant or on his behalf. It shows, says counsel for the applicant, that the solicitors are entitled to sign a notice of application for leave to appeal on behalf of the applicant. Counsel refers to *R v Robinson* (1). The four persons concerned were charged with conspiracy to contravene the Forcible Entry Act 1429. One of them, the appellant Langford, absconded in the

(1) 134 JP 668; [1970] 3 All ER 369; [1971] 1 QB 156.

course of the trial after giving evidence, and it appears that he was still at large both when leave to appeal was given on 12th May 1970 and when the appeal was determined on 20th July 1970. However, when the appeal was heard the attention of the court was not drawn to the fact that the appellant Langford had absconded and that his solicitors had signed a notice of application for leave to appeal in his absence. Neither the fact nor its implications were considered by the court at all, and accordingly *R v Robinson* is no authority on the point which we have to consider.

It appears that in the course of the submissions on the application to discharge the jury from giving a verdict in this case, a reference was made to *R v Robinson*, and that the case was said by counsel for the Crown to be authority for the proposition that the applicant's solicitors might pursue an appeal on his behalf in his absence. It also appears that this view of *R v Robinson* may have influenced the trial judge in refusing the application to discharge the jury from giving a verdict. Those, however, are not matters which are of any assistance to this court in determining the matters which now fall for decision.

In *R v Richard Flower*, *R v Siggins*, *R v Eric Flower* (1), the accused Eric Flower and his two co-accused had been convicted on a variety of charges in December 1964. All three appealed against conviction and applied for leave to appeal against sentence. Later all three withdrew their applications for leave to appeal against sentence. Then, while the appeal against conviction was pending, the accused Eric Flower absconded and at the hearing of the appeal he did not appear and was not represented. Nevertheless his appeal was heard and determined along with the appeals of the other two. In delivering the judgment of the court, WIDGERY J said:

'I am reminded that it may be appropriate to state why the accused Eric Flower's appeal has been dealt with in his absence. The practice of this court where an appellant escapes, and for that reason is not present when an appeal is called on, is either to adjourn the appeal or dismiss it, according to the justice of the case. We have carefully considered in this case whether it would be proper to adjourn the accused, Eric Flower's appeal but it is quite apparent that all the points which he seeks to raise are points which have been raised and thoroughly canvassed by experienced counsel on behalf of the other accused between whom and the accused Eric Flower there is no sort of conflict of interest. We have gone, as we see it, to the limit to which the court could possibly go in the accused Eric Flower's appeal by quashing the two convictions to which I have referred and it, therefore, seems pointless to keep that appeal alive.'

It is apparent that *R v Flower* has no bearing on the point which this court now has to determine.

In *R v Jefferies* (2) the applicant had been convicted of conspiracy to cheat and defraud and sentenced to 30 months' imprisonment and ordered to pay £1,300 towards the costs of the prosecution. In December 1967 he gave notice of application for leave to appeal against conviction and sentence, but in February 1968, before his application had been considered by the court, he died. His widow, who was also his sole executrix, sought leave to pursue the applications. Leave was refused, and the court pointed out that not only the wording of s 3 of the Criminal Appeal Act 1907 but also the general tenor of the Act as a whole was such as to make the right of appeal strictly personal to the person convicted. A precisely similar observation may be made about the wording of s 1 of the Criminal Appeal Act 1968 and the general tenor of that Act.

(1) 129 JP 597; [1965] 3 All ER 669; [1966] 1 QB 146.

(2) [1968] 3 All ER 238; [1969] 1 QB 120.

It seems to this court that at any rate in all ordinary cases it is quite impossible for an accused person whose trial is still proceeding to give rational instructions to his advisers to initiate appeal proceedings either against conviction or against sentence. In order to consider whether an appeal against conviction is advisable, and if so, on what grounds, it is necessary to know the verdict, and, if there are several counts, the verdict on each of them. If there are two or more co-accused, it is or may be necessary to know what verdicts have been returned in the case of each accused; and, of course, it is vitally necessary to know the terms of the summing-up.

It is really no answer to these self-evident propositions to say that where at the end of the prosecution case there has been a submission of no case to answer on a point of law, and that submission has been overruled, the accused may then and there instruct his advisers that they are at all events to prosecute an appeal on that ground. The summing-up may reveal other and better grounds. In a case where the accused has absconded, are his advisers to confine themselves to the one point on which they have instructions to proceed, leaving it open to him to try and seek leave to raise further points later if and when he chooses to surrender? And if an accused absconds in the middle of his trial, leaving his solicitors to pursue on his behalf any points of appeal which occur to them as having some validity, are they to take the responsibility of choosing the grounds on which they will proceed without having discussed those grounds with him? In the ordinary course of events there would be discussion between the accused and his advisers whether there were any and, if so, what grounds of appeal. That discussion would take place after and not before conviction, and the accused's advisers would take the opportunity, at that stage, of advising him as to any risks which he might run as to costs or loss of time.

If it is obvious that a decision whether or not to appeal against conviction cannot rationally be taken before the verdict is known, it is if anything even more obvious that a decision whether or not to appeal against sentence cannot rationally be taken before the sentence is known. The court observes that in the present case leave to appeal against sentence is sought, although the sentences were not of course known before the applicant absconded, and although it has not, as the court understands the matter, been suggested that the applicant left any instructions which would cover an appeal against sentence.

The conclusion which the court draws from these considerations is that in all save the most exceptional cases the proper time for an accused person to take advice as to the prospects of an appeal, and to give instructions to his solicitor to initiate appeal proceedings is after conviction and sentence. Equally, that is the proper time for his solicitors to receive such instructions. In a case where an accused has, by absconding in the course of his trial, put it out of his power to give such instructions at the proper time, this court will as a general rule take the view that his solicitors have not been duly authorised to prosecute appeal proceedings on his behalf. That is the view which the court takes in this case and accordingly it follows that the notice of application for leave to appeal is not a valid notice and no further proceedings can be taken on it.

In reaching this conclusion the court has taken account of r 2 (5) of the Criminal Appeal Rules 1968. That paragraph does not of itself confer any authority on anybody to sign on behalf of an appellant. It merely provides that the signature of an agent shall be acceptable if he is otherwise duly authorised. It is therefore of no assistance in determining the matter now before us. If the applicant should at any time surrender and should then decide that he wishes to apply for leave to appeal, it will be open to him, if so advised, to seek an extension of time, although it is of course obvious that in the circumstances of this case an application for extension of time would be subjected to a rigorous scrutiny.

Finally, it is right to say that the decision of the court involves no kind of criticism of those representing the applicant, who have done their utmost to help him in the face of great difficulties and in the absence of any authority whether the application for leave to appeal would be entertained.

*Application refused.*

Solicitors: *H C L Hanne, Crawley & Co, Treasury Solicitor.*

T.F.R.B.

### COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER CJ, WIDGERY LJ AND COOKE J)

9th, 17th March, 1971

R v HUDSON. R v TAYLOR

*Criminal Law—Duress—Defence to offence—Essential elements—Neutralising will of defendant—Circumstances to be taken into account.*

Duress provides a defence to all offences, including perjury, except possibly treason or murder as a principal.

It is essential to the establishment of the defence that the threat should be effective at the moment when the crime is committed and it must be effective to neutralise the will of the defendant at the time. Where there is no opportunity for delaying tactics and the person threatened must make up his mind immediately whether he is to commit the criminal act or not, the existence at that moment of threats sufficient to destroy his will should provide him with a defence, even though the threatened injury may not follow immediately, but only after an interval.

Where the defence of duress is raised, it is always open to the Crown to prove that the defendant failed to avail himself of some opportunity which was reasonably open to him to render the threat ineffective, and, on this being established, the threat in question can no longer be relied on by the defence. In deciding whether such an opportunity is reasonably open to the defendant, the jury should have regard to his age and circumstances, and to any risks to him which may be involved in the course of action relied on.

APPEALS by Linda Hudson and Elaine Taylor against their conviction at Manchester Crown Court of perjury.

*J B R Hazan QC and R Brown for the appellants.*

*D G F Franks for the Crown.*

*Cur adv vult*

17th March. **WIDGERY LJ** prepared this judgment of the court which was read by **LORD PARKER CJ**: The appellants were convicted at the Manchester Crown Court on 18th May 1970 of perjury and each was granted a conditional discharge. They now appeal against their convictions by leave of the single judge. On 6th April 1969 a fight took place in a Salford public house between one Wright and one Mulligan with the result that Wright was charged with wounding Mulligan. Each of the appellants gave statements to the police and they were the principal prosecution witnesses at Wright's trial. The appellant Taylor is 19 and the appellant Hudson is 17. Wright's trial took place on 4th August 1969, but when called to give evidence the appellants failed to identify Wright as Mulligan's assailant. The appellant Taylor said that she knew no one called Jimmy Wright, and the appellant Hudson said that the only Wright she knew was not the man in the dock. Wright was accordingly acquitted and, in due course, the appellants were charged with perjury. At their trial they admitted that the

evidence which they had given was false, but set up the defence of duress. The basis of the defence was that shortly after the fight between Wright and Mulligan the appellant Hudson had been approached by a group of men including one Farrell who had a reputation for violence and was warned that if she 'told on Wright in court' they would get her and cut her up. The appellant Hudson passed this warning to the appellant Taylor, who said that she had also been warned by other girls to be careful or she would be hurt. The appellants said in evidence that in consequence of these threats they were frightened and decided to tell lies in court in order to avoid the consequences which might follow if they testified against Wright. This resolve was strengthened when they arrived at court for Wright's trial and saw that Farrell was in the gallery.

The recorder directed the jury as a matter of law that the defence of duress was not open to the appellants in these circumstances. He said:

'In my direction to you which you have to obey I tell you that duress can only arise when there is a threat made of death or serious personal injury and that threat must be a present immediate threat . . . [Later he continued:] Assuming everything in favour of [the appellants] . . . assuming that Farrell did make this threat to [the appellant Hudson] . . . assuming that that information was passed on by [the appellant Hudson] to [the appellant Taylor] and assuming that [the appellants] believed it; assuming in favour of [the appellant Taylor] and [the appellant Hudson] that [the appellant Taylor] was approached on various occasions by young women who said to her "Be careful and watch it" . . . assuming all that to be 100 per cent in their favour I direct you as a matter of law that that does not amount to duress. [The appellants] may very well have thought that if they did not tell lies something very unpleasant might happen to them in the future, but that is not a present immediate threat capable of being then and there carried out because when they told lies they were in a court of law with the recorder of Salford there for protection and with the police there in court and, members of the jury, I direct you that that does not amount to duress.'

It is now submitted that this was a misdirection in law and that the case should have been left to the jury to determine, as a fact, whether the appellants had acted under duress.

We have been referred to a large number of authorities and to the views of writers of text books. Despite the concern expressed in 2 Stephen's History of the Criminal Law in England, that it would be

'a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands.'

it is clearly established that duress provides a defence in all offences including perjury (except possibly treason or murder as a principal) if the will of the accused has been overborne by threats of death or serious personal injury so that the commission of the alleged offence was no longer the voluntary act of the accused. This appeal raises two main questions; first, as to the nature of the necessary threat and, in particular, whether it must be 'present and immediate'; secondly, as to the extent to which a right to plead duress may be lost if the accused has failed to take steps to remove the threat as, for example, by seeking police protection.

It is essential to the defence of duress that the threat shall be effective at the moment when the crime is committed. The threat must be a 'present' threat in the sense that it is effective to neutralise the will of the accused at that time. Hence an accused who joins a rebellion under the compulsion of threats cannot plead duress if he



remains with the rebels after the threats have lost their effect and his own will has had a chance to re-assert itself (*McCrowther's Case* (1) and *A-G v Whelan* (2)). Similarly a threat of future violence may be so remote as to be insufficient to overpower the will at the moment when the offence was committed, or the accused may have elected to commit the offence in order to rid himself of a threat hanging over him and not because he was driven to act by immediate and unavoidable pressure. In none of these cases is the defence of duress available because a person cannot justify the commission of a crime merely to secure his own peace of mind.

When, however, there is no opportunity for delaying tactics, and the person threatened must make up his mind whether he is to commit the criminal act or not, the existence at that moment of threats sufficient to destroy his will ought to provide him with a defence even though the threatened injury may not follow instantly, but after an interval. This principle is illustrated by *Subramaniam v Public Prosecutor* (3), when the appellant was charged in Malaya with unlawful possession of ammunition and was held by the Privy Council to have a defence of duress, fit to go to the jury, on his plea that he had been compelled by terrorists to accept the ammunition and feared for his safety if the terrorists returned.

In the present case the threats of Farrell were likely to be no less compelling, because their execution could not be effected in the court room, if they could be carried out in the streets of Salford the same night. Insofar, therefore, as the recorder ruled as a matter of law that the threats were not sufficiently present and immediate to support the defence of duress we think that he was in error. He should have left the jury to decide whether the threats had overborne the will of the appellants at the time when they gave the false evidence.

Counsel for the Crown, however, contends that the recorder's ruling can be supported on another ground, namely, that the appellants should have taken steps to neutralise the threats by seeking police protection either when they came to court to give evidence, or beforehand. He submits on grounds of public policy that an accused should not be able to plead duress if he had the opportunity to ask for protection from the police before committing the offence and failed to do so. The argument does not distinguish cases in which the police would be able to provide effective protection, from those when they would not, and it would, in effect, restrict the defence of duress to cases where the person threatened had been kept in custody by the maker of the threats, or where the time interval between the making of the threats and the commission of the offence had made recourse to the police impossible. We recognise the need to keep the defence of duress within reasonable bounds but cannot accept so severe a restriction on it. The duty, of the person threatened, to take steps to remove the threat does not seem to have arisen in an English case but in a full review of the defence of duress in the Supreme Court of Victoria (*R v Harley*, *R v Murray* (4)), a condition of raising the defence was said to be that the accused 'had no means, with safety to himself, of preventing the execution of the threat'.

In the opinion of this court, it is always open to the Crown to prove that the accused failed to avail himself of some opportunity which was reasonably open to him to render the threat ineffective, and that on this being established the threat in question can no longer be relied on by the defence. In deciding whether such an opportunity was reasonably open to the accused the jury should have regard to his age and circumstances, and to any risks to him which may be involved in the course of action relied on.

(1) (1746), Fost 13; 18 State Tr 391.

(2) [1934] IR 518.

(3) [1956] 1 WLR 965.

(4) [1967] VR 526.



In our judgment the defence of duress should have been left to the jury in the present case, as should any issue raised by the Crown and arising out of the appellants' failure to seek police protection. The appeals will, therefore, be allowed and the convictions quashed.

*Appeals allowed.*

Solicitors: Registrar of Criminal Appeals; Director of Public Prosecutions.

T.R.F.B.

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### QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, WIDGERY, LJ AND BRIDGE, J)

18th March 1971

#### PETTICOAT LANE RENTALS LTD v SECRETARY OF STATE FOR THE ENVIRONMENT

*Town and Country Planning - Development - Open land used for market trading - Building erected over whole of site - Ground floor area remaining open - Automatic extinction of former use - New planning unit with nil use created.*

Where formerly open land is developed by the erection of a building over the whole of the land the land is merged in the new building and a new planning unit starting with a nil use is created. Any use to which it is subsequently put is a change of use which, if not authorised by planning permission, can be restrained by planning control. It is unnecessary that there should be in the planning permission granted for the erection of the new building any express condition excluding rights to continue former uses of the open land, because those former uses have been automatically extinguished by the disappearance of the land.

*Quaere*, however, whether, when land that was formerly open remains open and unbuilt on, and has been embodied in the curtilage of a site developed by new permitted building for other purposes, such building development automatically extinguishes the previous rights of use of the land which was, and still remains, open.

APPEAL by Petticoat Lane Rentals Ltd from a decision of the Minister of Housing and Local Government dismissing an appeal by the appellants against an enforcement notice served under the Town and Country Planning Act 1962 by the Tower Hamlets London Borough Council in respect of land situate on the ground floor of United Standard House, Middlesex Street, London E1.

M S Rich for the appellants.

Gordon Slynne for the Secretary of State for the Environment.

**WIDGERY LJ:** This is an appeal by Petticoat Lane Rentals Ltd from a decision of what was then the Ministry of Housing and Local Government, which decision was given on 21st May 1970, upholding the validity of an enforcement notice served under the Town and Country Planning Act 1962 by the Tower Hamlets London Borough Council on the appellants. The notice referred to an area of land on the ground floor of a newly erected building called United Standard House in Middlesex Street within the borough of Tower Hamlets. It was recited that this area

on the ground floor of that building had been the subject of a material change of use by using it for the purpose of siting and carrying on trade from market stalls without the grant of permission. The notice required the appellants to discontinue that allegedly irregular use.

The circumstances of the case can be quite shortly recited, and I think in the end can be narrowed to a very fine point. This newly erected building, United Standard House, is on a site in Middlesex Street which was covered with buildings before the second world war, but which buildings were very badly damaged by bombing. In due course the site was cleared and it remained as a cleared site for a substantial number of years. We are told by counsel for the appellants that during that period the appellants had a lease of the site, and that they used it by letting out stall spaces to various street traders who wished to carry on business there and that useful activity continued until a time came when the site was to be redeveloped by the erection of a new building. In 1963 planning permission was granted for such redevelopment. It was granted to Richard Costain, the builders, and the development authorised was in these terms:

'Redevelopment of the sites bounded by Middlesex Street, Goulston Street and site of Boars Head Yard, Stepney, by the erection of a building comprising office, warehousing, supermarket and car parking and loading area (to be used for market trading on Sundays), and for the formation of a new road linking Middlesex Street and Goulston Street and for the formation of a turning and loading space off Goulston Street.'

I do not find it necessary to refer to the conditions attached to that permission.

What I have said indicates that permission was being granted for the erection of a new commercial building with car parking and loading area below. The plans show that the whole of the ground floor was to be used for these purposes, and that it was not enclosed by walls but was open to the street on all four sides, the building itself being carried by suitably disposed pillars. The reference in the planning permission to the use of the car park and loading area for market trading on Sundays was no doubt a common sense reflection of two facts, one that a great deal of such trading had been carried on in the past on Sundays, and secondly that the need for the car parking space would on that day of the week be very much reduced. However, the permission expressly allowed trading on Sundays, but contained no word of market trading during the rest of the week. The permission was implemented, that is to say the building was erected and it was completed in about the year 1965. During the process of the building, some steps which one cannot identify with precision were taken to carry on market trading on this site, or adjacent to this site, or both, both on Sundays and on weekdays. The inspector who conducted the inquiry found the evidence somewhat inconclusive on this subject, but that there was an attempt to keep the street trading alive during the rebuilding is clear beyond doubt, and if one was required in this case to consider whether those responsible intended to abandon street trading, there would be a great deal of evidence to indicate that they had not. However, the case does not develop in that way, and I do not find it necessary to go in greater detail into the activities pursued whilst the building operation was being carried on.

The building was completed, the appellants acquired a new lease of the ground floor not, so far as the landlords were concerned at any rate, with a view to market trading, but with a view to managing the car park which they were able to do at some profit to themselves, but in parallel with the use of the ground floor as a loading bay and car park the street traders almost immediately came in again, and since the completion of the building and, one gathers, up to the present time, this area on the

ground floor within the confines of the building, in the sense it is underneath the main development above, has been used by market traders on Sundays in accordance with the permission, and on weekdays, may I say at once, not in accordance with the permission. In these circumstances it was incumbent on the planning authority to require the discontinuance of the street trading on weekdays. Counsel for the appellants puts his case in very strong terms. His argument comes down to this. What is alleged against the appellants, he says, is that they have made a material change of the use of this land by using it for street trading. He says that that allegation is factually unsound because the area has been used for trading of this kind for many years prior to the redevelopment, as much as it could be done during the redevelopment, and continuously since the redevelopment. He says that the facts do not justify the allegation that there has been any change, let alone material change, in the use to which this area has been put throughout the whole of the relevant period. The inspector's view, which was adopted by the Minister, and which is the basis of counsel for the Secretary of State's argument to us today, is that the effect in law of the erection of this new building pursuant to the planning permission to which I have referred has been to, and I quote the Minister's words: 'extinguish the former use of the site.' His argument is that, on the history which I have related, one is now faced with a building which has an entirely new planning history, that is to say really a building with no planning history, starting afresh from the time when it was completed. He says that the previous use rights and activities are all extinguished by the rebuilding and that, it is submitted, is a complete answer to the appellants' case.

This question of how far existing planning rights can be lost by the occupier obtaining and implementing an inconsistent planning permission has not as yet been fully developed in the authorities. One goes first of all to a decision of this court, *Prossor v Minister of Housing and Local Government* (1). That is a case of a petrol service station on a main road where the occupier of the petrol service station sought and obtained planning permission to rebuild the petrol station. He was given such permission and an express condition was attached to the permission to the effect that no retail sales other than the sale of motor accessories should be carried out on the site. In fact, having let the establishment, the occupier began to exhibit second-hand cars for sale on the site, which was clearly a breach of the condition if the condition was effective. It was argued in favour of the occupier that he was enabled to do this because there was a continuing and unbroken use of the land for the sale of secondhand cars, and in his contention the fact that he had had a new and inconsistent planning permission and had implemented it did not destroy that right. LORD PARKER CJ, having dealt with a number of arguments not relevant to the present appeal, put the matter thus:

'Assuming . . . that there was at all material times prior to April, 1964 [the date of the rebuilding], an existing use right running on this land for the display and sale of motor cars, yet by adopting the permission granted in April, 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to have begun afresh on April 4th, 1964, with the grant of this permission, a permission which was taken up and used, and the sole question here is: has there been a breach of that condition?'

Some argument has been directed to the fact that in *Prossor v Minister of Housing and Local Government* the use of the land for the display of secondhand motor cars was expressly prohibited by a condition of the planning permission. For my part, I

(1) (1968), 67 LGR 109.

do not think that that is a relevant factor at all. I think that precisely the same result would have appeared in *Prossor's* case if, instead of granting permission for use as a garage and then attaching a condition to take out the use for secondhand car sales which would otherwise have been included in the grant, the draftsman had chosen in a rather more complicated phraseology to specify precisely what could be done and had simply left out the sale of secondhand cars. I do not, therefore, regard the fact that there was an express prohibition as being anything more in that case than an indication of the fact that the draftsman found it easier to express his wishes in that way.

That case was referred to in the Court of Appeal shortly afterwards in *Gray v Minister of Housing and Local Government* (1). I do not propose to deal with the facts of that case because they are a long way away from the present case. I am concerned only with the observations of LORD DENNING MR and WINN LJ on *Prossor's* case (2). LORD DENNING MR referred to *Prossor's* case in these terms:

'the recent case of *Prossor v Minister of Housing and Local Government* supports that point of view [i.e. a view that existing rights would be lost by an inconsistent and later planning permission]. I would not throw the slightest doubt on that decision. But it is unnecessary to go into it today.'

Then he proceeded to say why on the facts of *Gray's* case it was not necessary to refer to *Prossor*. WINN LJ adopted the same reasoning as LORD DENNING MR in his conclusion in that case, then went on to show some concern about the correctness of *Prossor's* case. I will not read the paragraph in full because WINN LJ did not disclose precisely why he was apprehensive about the correctness of *Prossor's* case, but he shows that he was troubled about it and was not disposed to say it ought to be followed in the Court of Appeal. The position, as I see it, is that although *Prossor's* case had not been overruled or even seriously criticised, it is a case which we should apply with some little care.

For my part, I also think that it was entirely correctly decided, but I think in extending and applying it we should tread warily and allow our experience to guide us as that experience is obtained. Accordingly, I decline to use any general terms in saying what *Prossor's* case decides or how it applies to the present situation, but I am quite confident that the principle of *Prossor's* case can be applied where, as here, one has a clear area of land subsequently developed by the erection of a building over the whole of that land. Where that happens, and it certainly happened in the case before us, one gets, in my judgment, an entirely new planning unit created by the new building. The land as such is merged in that new building and a new planning unit with no planning history is achieved. That new planning unit, the new building, starts with a nil use, that is to say immediately after it was completed it was used for nothing, and thereafter any use to which it is put is a change of use, and if that use is not authorised by the planning permission, that use is a use which can be restrained by planning control. As in *Prossor's* case, it seems to me to make no difference whether the old use sought to be restored was expressly extinguished by the new planning permission, or whether it was merely omitted from the terms of grant in that permission. The fact that it is not authorised means it is something which necessarily can be controlled because it is a change of use from the nil use which follows the erection of a new planning unit.

Counsel for the appellants has strenuously argued that, notwithstanding the doctrine in *Prossor's* case and the considerations to which I have referred, the ground floor should retain in some way the existing use to which the old building site has been

(1) (1969), 68 LGR 15.

(2) (1968), 67 LGR 109.

put. He also seeks to obtain some assistance from the fact that the ground floor in the present case was not enclosed. With the realism which his argument shows he realised that it would be very difficult to argue that with an enclosed ground floor the pre-development use of the open space had survived, but he says that as the ground floor is not enclosed, as it is therefore still an open space in one sense, then those pre-development uses survive. I can see no substance in that argument at all. Whether the ground floor is enclosed or not enclosed, it is part of the new building. The new building embraces the land and accordingly it is a new entity; the conclusion is that to which I have referred. I would therefore dismiss the appeal.

**BRIDGE J:** I entirely agree with the result proposed by WIDGERY LJ. I would wish to express only one limited reservation as to the reasons by which WIDGERY LJ arrives at the result. For my part, I would draw a distinction between, on the one hand, a case where, as here, land formerly open and unbuilt on has been used for a certain purpose and subsequently that land itself has been built on; and, on the other hand, a case where open land has been used, that land has subsequently been embodied in the curtilage of a site developed by building for other purposes but the building has not extended over the land used for the former purpose. The Town and Country Planning Act 1962 itself, as it seems to me, draws a distinction between change in the use of buildings and change in the use of other land. I entirely agree with WIDGERY LJ that where what was formerly open land becomes part of a building or as he aptly puts it is merged with the building, the previous planning unit ceases to exist, its rights of use disappear, and one starts with a clean sheet and a new planning unit comprising the new building. In that case I entirely agree that it is quite unnecessary that one should find in the planning permission granted for the erection of the new building, any express condition excluding rights to continue former uses of the open land, precisely because those former uses are automatically extinguished by the disappearance of the land to which they attached. But in a case where, as in *Prossor v Minister of Housing and Local Government* (1), the land formerly used (in *Prossor's* case for the sale of motor cars) remains itself open and unbuilt on, albeit new permitted building has been carried out within the curtilage, I would wish to reserve the question whether in the absence of an express condition, such as there was in *Prossor's* case, the building development in such a case automatically extinguishes the previous rights of use of the land which was and still remains open.

**LORD PARKER CJ:** I agree that this appeal should be dismissed and for the reasons given by WIDGERY LJ. Like BRIDGE J, I would reserve for future consideration what the position would be if the whole of the land was not redeveloped by being covered by a building.

*Appeal dismissed.*

Solicitors: *S Eversley & Co; Solicitor, Secretary of State for the Environment.*

T.R.F.B.

(1) (1968), 67 LGR 109.

COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW, LJ, SHAW AND BEAN, JJ)

19th March 1971

R v ROBERTS

*Criminal Law—Sentence—Extended term of imprisonment—Not to comprise suspended sentence—Suspended sentence not to run consecutively to extended term—Matters appropriate to be considered in fixing length of extended term—Criminal Justice Act 1967, s. 37.*

An extended term of imprisonment imposed under s 37 of the Criminal Justice Act, 1967 should not comprise a suspended sentence.

The appellant was sentenced to two years' imprisonment for a substantive offence and a suspended sentence of two years' imprisonment was brought into operation so as to run consecutively. The total period of four years was certified as an extended sentence of imprisonment under s 37 of the Criminal Justice Act, 1967.

HELD: that the sentence passed was wrong, because the suspended sentence should not have been made part of the extended term, nor would it be right to order the suspended sentence to come into operation consecutively to the extended sentence; in the present case it would have been open to the sentencing court to have imposed a four years' extended term for the substantive offence and to have ordered the suspended sentence to come into operation not consecutively, but concurrently, and it would be within the powers of the Court of Appeal under s 11 (3) of the Criminal Appeal Act, 1968, to substitute such a sentence, but in all the circumstances the proper course was to make the whole of the sentence a non-extended sentence and to vary the sentence passed by imposing a sentence of two years' imprisonment for the substantive offence and ordering the two-year suspended sentence to come into operation consecutively, neither the whole nor any part of the sentence being certified as an extended term.

APPEAL by David Roberts against a sentence of two years' imprisonment imposed at Dorset Quarter Sessions and a suspended sentence of two years' imprisonment, imposed on 21st July 1970, which was then ordered to take effect and to run consecutively, the total sentence of four years being ordered to be an extended term of imprisonment under s 37 of the Criminal Justice Act 1967.

D M Webster for the appellant.

The Crown was not represented.

MEGAW LJ delivered this judgment of the court: The appellant, David Roberts, was convicted at Dorset Quarter Sessions on 25th September 1970 of the offence of obtaining pecuniary advantage by deception. He was sentenced for that offence to two years' imprisonment. In addition a suspended sentence of two years' imprisonment, which had been imposed on him on 21 July 1970, was ordered to take effect consecutively and the resulting total sentence of four years' imprisonment was certified as being an extended term of imprisonment under s 37 of the Criminal Justice Act 1967. The appellant was also ordered to pay £8 12s 2d compensation. The appellant appeals against sentence by leave of the single judge. What principally actuated the single judge to grant leave was in order that the full court might consider whether it was appropriate that a suspended sentence put into operation should be treated as being part of an extended sentence.

The facts of the offence are simple. On 15th August 1970 the appellant booked into the Royal Hotel in Weymouth, giving a false name and address. That was on a Saturday. On the following Tuesday, 18th August 1970, the manageress of the hotel discovered that he had left the hotel the night before without paying his bill,



the amount of which was £8 12s 2d. The appellant had left Weymouth on the Monday and had gone to Bournemouth, there using yet a different false name. He had booked into another hotel there. When he was seen by the police in Bournemouth on 18th August regarding the non-payment of the bill in the Weymouth hotel, he said that he registered in a false name because 'I'm erratic' and he proffered various other matter in his discussions with the police. In his evidence at his trial the appellant said it was not his intention to evade paying the bill; he intended to return to the Royal Hotel when he had got in funds and he said there was no intention to defraud. That defence was, perhaps not surprisingly, rejected by the jury and he was convicted.

The appellant is 31 years of age. He has unfortunately a very lengthy record of criminal offences consisting of dishonesty of various types. He has in fact 17 previous convictions which involve a total of somewhere in the order of 181 offences including those which were taken into consideration on various occasions. The offences included malicious damage, obtaining credit by fraud, taking and driving away a motor vehicle, larceny, obtaining money by worthless cheques, false pretences, housebreaking and burglary. He had been at various times to an approved school, Borstal training, he had been fined, he had been placed on probation, he had been in prison and he had been given the suspended sentence to which reference has been made. It will be sufficient for this purpose to refer to the four offences which were made the subject-matter of the notice under s 38 of the Criminal Justice Act 1967, in respect of the extended sentence. In November 1961 for housebreaking and stealing he had been sentenced to two years' imprisonment; in August 1964 for stealing, again sentenced to two years' imprisonment; in March 1967 for false pretences he had been sentenced to four years' imprisonment; finally, on 21st July 1970, for burglary, a sentence of two years' imprisonment which had been suspended for three years. In relation, as has been mentioned, to various of his offences he asked for a large number of other offences to be taken into consideration. For example, in March 1967 when he was sentenced at Gloucester County Quarter Sessions to four years' imprisonment for false pretences he asked for 85 offences to be taken into consideration.

The grounds put forward by counsel who has appeared for the appellant in this court are principally in relation to what in some respects might be described as a technicality. Nevertheless it is a matter which this court has to consider. It is a matter which arises not infrequently. Counsel referred the court to past decisions of this court such as *R v Ithell*, *R v Jones*, *R v Tomlinson* (1). He submits that the deputy chairman in this case did not follow the guidance there laid down that where there is a question of a suspended sentence being put into operation the court should first consider the appropriate sentence for what I call the substantive offence, the offence for which the appellant is before the court on that occasion, and, having decided the appropriate sentence, it should then go on to consider what is to be done in relation to the suspended sentence. This court does not think that there is any criticism of substance in the way in which the deputy chairman approached the sentence in this case in that respect.

More difficult, however, is the position which arises as a result of the decisions of this court in *R v Barrett* (2) and *R v Wilkinson* (3). In *R v Barrett*, in which judgment was delivered on 20th June 1969, the sentence appealed from was a sentence imposed by Hampshire Quarter Sessions similar to that which has been imposed in the present case. It was a sentence totalling three years' imprisonment for the substantive

(1) 133 JP 371; [1969] 2 All ER 449.

(2) 133 JP 590; [1969] 3 All ER 272.

(3) 133 JP 22; [1969] 3 All ER 1263; [1970] 1 QB 123.

offences which were being dealt with by the court and an order bringing into operation an earlier suspended sentence of 18 months' imprisonment. The court of quarter sessions had certified the total of  $4\frac{1}{2}$  years as an extended sentence. So also in the present case the court has imposed a sentence of two years' imprisonment, has directed that the suspended sentence of two years' imprisonment should be brought into operation and has certified the whole resulting four years' imprisonment as being an extended sentence. In *R v Barrett* (1) the court held that this was wrong and the court said in its judgment:

'After all, if you order that a suspended sentence should become an extended sentence you are altering the whole quality of the sentence as originally imposed and that is clearly contrary to principle. The practical result is rather minimal ...'

Nevertheless the court said that the principle must be followed. So the court there, having come to that conclusion, directed that the extended sentence certificate should apply only to the three years but the total of  $4\frac{1}{2}$  years was allowed to stand. That meant presumably that the  $1\frac{1}{2}$  years of non-extended sentence would begin to take effect at the completion of the three year extended sentence.

Then came *R v Wilkinson* (2). There the judgment was delivered by LORD PARKER CJ on 14th July 1969, which was some three weeks after the decision in *R v Barrett*. In *R v Wilkinson* the applicant was not represented by counsel and there is no indication that the court's attention was drawn to *R v Barrett*. In *R v Wilkinson* the sentence imposed by Cardiff Quarter Sessions for the substantive offences was an extended sentence of five years' imprisonment and the court had brought into operation two suspended sentences of six months' imprisonment consecutive to one another which had been imposed previously in a magistrates' court. Quarter sessions did not purport to make the resulting total of six years' imprisonment an extended sentence, as had been done by Hampshire Quarter Sessions in *R v Barrett*. Only the five years was an extended sentence, so that it would be followed at its expiration by the 12 months non-extended sentence. That indeed is what the court in *R v Barrett* said should be done. But in *R v Wilkinson* the court said unequivocally that it was wrong to make a suspended sentence run consecutively to an extended sentence. LORD PARKER CJ said:

'The court feels that they must interfere in regard to the way in which the suspended sentence was dealt with. The deputy recorder, no doubt following the directions of this court, ordered that sentence to come into force consecutive. However, this must be clearly an exception to the general rule that suspended sentences when they come into operation should be consecutive, and for this reason: that it is quite unworkable to have a 12 months' sentence coming into force consecutive to an extended sentence under which the applicant will spend what otherwise would be his period of remission on licence. Accordingly, in those circumstances the court feels that the only course is to allow this appeal to the extent of ordering the suspended sentence to come into force concurrent with and not consecutive to the five years.'

The court then went on to indicate how a situation of this sort might be dealt with. In the last paragraph of the judgment LORD PARKER CJ said:

'The court would only add this: that courts should bear in mind the difficulty of making the operation of a suspended sentence consecutive when an extended

(1) 133 JP 590; [1969] 3 All ER 272.

(2) 133 JP 22; [1969] 3 All ER 1263; [1970] 1 QB 123.

sentence is being certified. It seems to this court that it would be quite proper to take that into consideration in considering what to certify as the extended sentence. If, for instance, the deputy recorder in this case, bearing in mind that he could not make the 12 months' imprisonment suspended a consecutive sentence, had said that the extended sentence should be one of six years and the suspended sentence concurrent thereto, that would, in the opinion of this court, have been perfectly proper.'

So today this court is faced, as we see it, with a situation in which, according to the decision in *R v Barrett* (1), the sentence imposed in the present case is wrong. Nothing in *R v Wilkinson* (2) casts doubt on that part of the decision in *R v Barrett*. Therefore we must hold that the sentence as imposed here was wrong because, the suspended sentence having been made to operate consecutive to the substantive sentence, the whole of that sentence was certified as an extended sentence. On the other hand, in the light of *R v Wilkinson*, we take the view that it would not be right to adopt the course which was followed in *R v Barrett* so as to make a non-extended sentence, that is the suspended sentence, come into operation consecutive to the extended sentence. In the light of *R v Wilkinson*, which in this context we prefer to follow, that course would be wrong.

Counsel has submitted that the sentence which was imposed here for the substantive offence, that of two years' imprisonment, was at any rate the maximum that could properly have been imposed for the substantive offence, which was, he said, quoting the words of the learned deputy chairman, a mean little offence; and counsel invites this court in those circumstances to take the course which it was said was proper in the last paragraph of the judgment in *R v Wilkinson*, i.e. either to reduce the two years, or, if the two years is left standing, to make the two years on the suspended sentence run concurrently with it, so that it would be two years in all. In the view of this court that would not be appropriate in the present case. On the basis of what has been said in the last paragraph of *R v Wilkinson* (2) it would have been open to the sentencing court in the present case to have imposed a four year extended sentence for the substantive offence with the two year suspended sentence put into operation, not extended but running concurrently. It would be within the powers of this court under s 11 (3) of the Criminal Appeal Act 1968 to substitute that sentence now. However, this court has decided that in all the circumstances the proper course is simply to make the whole of this sentence a non-extended sentence; i.e. the sentence of 'four years' imprisonment certified as an extended sentence will be quashed and there will be substituted therefor a sentence of two years' imprisonment for the substantive offence, with the two year suspended sentence brought into operation to run consecutively to it, but neither the whole nor any part of that sentence will be an extended sentence. The result is that the sentence will be four years' imprisonment in total, as now, but will not be an extended sentence.

*Sentence varied.*

Solicitor: *Registrar of Criminal Appeals.*

T.F.R.B.

(1) 133 JP 590; [1969] 3 All ER 272.

(2) 133 JP 22; [1969] 3 All ER 1263; [1970] 1 QB 123.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER CJ, WIDGERY LJ AND BRIDGE J)

22nd March 1971

R v TURNER

*Criminal Law—Theft—Possession or control—No qualification of words in statute—Possession or control in fact sufficient—Removal of car by owner from near garage where left for repairs—Dishonesty—Belief in claim of right—Theft Act 1968 (c 60) s 2 (1), s 5 (1).*

By s 5 (1) of the Theft Act, 1968: "Property shall be regarded as belonging to any person having possession or control of it..." There is no ground for qualifying the words "possession or control" and it is sufficient that the person from whom the property was appropriated had possession or control in fact.

Where, therefore, the appellant had taken his own car from the proximity of a garage where he had left it for repair without the knowledge of the garage proprietor and without paying the bill,

HELD: it was open to the jury to find that the garage proprietor, although he had no lien on the car, was at the time of the appropriation of the car by the appellant in possession or control of it in fact.

Held, further, as the whole test of dishonesty was the mental element of belief, the jury had been properly directed that, if the defendant believed he had a right to appropriate the car within the meaning of s 2 (1), albeit there was none, he would fall to be acquitted.

APPEAL against conviction by Frank Richard Turner who, at North East London Quarter Sessions, was convicted of the theft of a Sceptre car, fined £200 with three months to pay or 12 months' imprisonment in default, and ordered to pay £150 towards the costs of the prosecution.

P M Herbert for the appellant.

H M Self for the Crown.

LORD PARKER CJ delivered this judgment of the court: On 28th July 1970 at North East London Quarter Sessions, the appellant was found guilty by a majority verdict of the theft of a Sceptre car. He was fined £200 with three months to pay or 12 months imprisonment in default, and was ordered to pay £150 towards the prosecution costs. He now appeals on a point of law against his conviction, and also applies for leave to appeal against sentence.

It is worth recording that this was a new trial, his original conviction having been quashed by this court in April 1970 on the basis that his plea of guilty at the time was a nullity. Accordingly it was a venire de novo that was ordered. The facts need not to be stated at great length, although there is considerable disparity in the accounts given on behalf of the Crown and the defence. The appellant was at the material time living in Seymour Road, East Ham, with a Miss Nelson and their children. Three miles away a man called Arthur Edwin Brown ran a garage in Carlyle Road, Manor Park. There is no doubt that at some time prior to 7th March 1969, the appellant took a Sceptre car of which he was the registered owner to Brown's garage for repairs. It was Mr Brown's case that he did those repairs, that as he was short of space he left the car in Carlyle Road some 10 to 20 yards from the garage. The ignition key had been handed to him by the appellant, and this he retained on the keyboard in his office. According to Mr Brown, on 7th March 1969 the appellant called at the garage and asked if the car was ready. On being told that it was except that it might require to be tuned, the appellant said that he would return on the next day, i.e. Saturday 8th March 1969, and would pay Mr Brown for the repairs and

pick up the car. A few hours later, however, Mr Brown found that the Sceptre car had gone; moreover whoever had taken it had had a key, because the key that Mr Brown had was still on the keyboard. He reported the matter to the police.

Apparently night after night thereafter until 16th March 1969 Mr Brown, according to him, went round the neighbouring streets to see if he could find the car, and sure enough on Sunday 16th March 1969 he found it parked in a street near to the appellant's flat. It was, moreover, his evidence that he did not know the appellant's full name or his address and only knew of him as Frank. What Mr Brown then did was to take the car back to his garage, to take out the engine and then tow it back less the engine to the place from which he had taken it. Meanwhile, the police made enquiries of the appellant and there is no doubt in the light of what happened afterwards, that he, the appellant, told lie after lie to the police. He said that Mr Brown had never had his Sceptre car at all, that the car had never been to the garage, and the only work that Mr Brown had done was to a Zephyr car on an earlier occasion. However, a time came when he abandoned those denials and agreed that he had taken the car to the garage, and that he had taken it away and had never paid for it. In saying that, he however emphasised that he had taken it away with the consent of Mr Brown. It was on those short facts that the jury, as I have said by a majority, found the appellant guilty of the theft of his own car.

The trial lasted, we are told, six days, in the course of which every conceivable point seems to have been taken and argued. In the result, however, when it comes to this court two points, and two only are taken. It is said in the first instance that while Mr Brown may have had possession or control in fact, that is not enough, and that it must be shown before it can be said that the property 'belonged to' Mr Brown, those being the words used in s 1 (1) of the Theft Act 1968, that that possession is, as it is said, a right superior to that in Mr Brown. It is argued from that, in default of proof of a lien—and the judge in his summing-up directed the jury that they were not concerned with the question of whether there was a lien—that Mr Brown was merely a bailee at will and accordingly that he had no sufficient possession.

The words 'belonging to another' are specifically defined in s 5 of the Act. Section 5 (1) provides:

'Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest ...'

The judge directed the jury that they were not concerned in any way with lien and the sole question was whether Mr Brown had possession or control. This court is quite satisfied that there is no ground whatever for qualifying the words 'possession or control' in any way. It is sufficient if it is found that the person from whom the property is taken, or to use the words of the Act, appropriated, was at the time in fact in possession or control. At the trial there was a long argument whether that possession or control must be lawful, it being said that by reason of the fact that this car was subject to a hire-purchase agreement, Mr Brown could never even as against the appellant obtain lawful possession or control. This court is satisfied that the judge was quite correct in telling the jury that they need not bother about lien, and that they need not bother about hire-purchase agreements. The only question was: Was Mr Brown in fact in possession or control?

The second point that is taken relates to the necessity for proving dishonesty. Section 2 (1) provides:

'A person's appropriation of property belonging to another is not to be regarded as dishonest—(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person ...'

The judge, in dealing with this matter, said, and I am only taking passages from his summing-up:

'Fourth and last, they must prove that [the appellant] did what he did dishonestly and this may be the issue which lies very close to the heart of this case.'

He then went on to give them a classic direction in regard to claim of right, emphasising that it is immaterial that there exists no basis in law for such belief. He reminded the jury that the appellant had said categorically in evidence: 'I believe that I was entitled in law to do what I did.' At the same time he directed the jury to look at the surrounding circumstances. He said this:

'The prosecution say that the whole thing reeks of dishonesty, and if you believe Mr Brown that the [appellant] drove the car away from Carlyle Road, using a duplicate key, and having told Brown that he would come back tomorrow and pay, you may think the prosecution are right.'

What counsel for the appellant says on this point is this. He says again that if in fact one disregards lien entirely, as the jury were told to do, then Mr Brown was a bailee at will, and the car could have been taken back by the appellant perfectly lawfully at any time whether any money was due in regard to repairs or whether it was not. He says, as the court understands it, first that if there was that right, then there cannot be theft at all, and secondly, that if and insofar as the mental element is relevant, namely belief, the jury should have been told that he had this right and be left to judge, in the light of the existence of that right, whether they thought he may have believed, as he said, that he did have a right.

This court, however, is quite satisfied that there is nothing in this point whatever. The whole test of dishonesty is the mental element of belief. No doubt, although the appellant may for certain purposes be presumed to know the law, he would not at the time have the vaguest idea whether he did have in law a right to take the car back again, and accordingly when one looks at his mental state, one looks at it in the light of what he believed. The jury were properly told that, if he believed that he had a right, albeit there was none, he would nevertheless fall to be acquitted. This court, having heard all that counsel for the appellant has said, is quite satisfied that there is no manner in which this summing-up can be criticised, and that accordingly the appeal against conviction should be dismissed.

As regards sentence, it is to be observed that in fact the judge imposed on the appellant a larger fine and a larger order in regard to prosecution costs than had been made at the earlier trial. He said that he did so because, after six days, he knew very much more about the case than the judge who dealt with the matter originally on a plea of guilty. This court is quite satisfied that he was entitled to approach the matter in that way, and having said that, it is clear that this penalty in no way erred in principle. Accordingly the application for leave to appeal against sentence is refused.

*Application refused.*

Solicitors: *Somers & Laity; Solicitor, Metropolitan Police.*

T.R.F.B.



COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, FENTON-ATKINSON, LJ, AND SIR GORDON WILLMER)

25th, 26th, 29th March 1971

CUMINGS AND OTHERS v BIRKENHEAD CORPORATION

*Education—Administrative duty of authority—Allocation of pupils to certain schools—Wishes of parents—Complaints to Minister—Education Act, 1944, s. 68, s. 76.*

An education authority sent to the parents of children who were going to begin their secondary education in September, 1968, a circular in which it was stated that "pupils who attend Roman Catholic primary schools will be considered only for Roman Catholic secondary schools, so that parents of these children will not be able to opt for maintained county secondary schools. This is because, in the long term, maintained county secondary comprehensive schools will only have sufficient accommodation for pupils from county and Church of England primary schools". Some parents complained that the authority had acted unlawfully in that they had segregated the children into two categories of Roman Catholic and non-Roman Catholic and that that was ultra vires their statutory powers and so invalid. They contended that the authority were bound to regard the wishes of the parents, that they were fettering their discretion under the Education Act, 1944, by laying down a policy as to which pupils should go to which secondary schools, and that in so doing they were in breach of s. 76 of the Act.

**HELD:** the authority had not gone outside their powers; they had laid down a policy and given good reasons for it; the wishes of parents were only one matter among many other things to which the authority might have regard and which might outweigh the wishes of the parents; and, consequently, the authority was not in breach of s. 76 and the submission that the course which they had adopted was ultra vires and illegal was plainly wrong.

**Per CURIAM:** If a parent felt he had a genuine cause for complaint, he had his remedy by complaining to the minister under s. 68 of the Act.

**APPEAL** by the first plaintiff, Gordon Cumings, from a decision of UNGOED-THOMAS J on the trial of a preliminary issue in an action by the first plaintiff, Patrick Joseph Butler, and William Henry Mighall against the defendants, Birkenhead Corporation, claiming that the defendants had acted unlawfully in that they had segregated schoolchildren into two categories of Roman Catholic and non-Roman Catholic.

*Leonard Caplan QC and Anthony Lester for the first plaintiff.  
Julian Byng for the defendants.*

**LORD DENNING MR:** In the county borough of Birkenhead the council, in their capacity of education authority, provide schools for the children. They fall into two groups: the Roman Catholic schools on the one hand, and the non-Roman Catholic on the other. The non-Roman Catholic comprise the Church of England schools and non-denominational schools. The younger children go to primary schools. The older children to secondary schools. We are only concerned today with the secondary schools to which the children proceed from the primary schools.

The borough council of Birkenhead, when they were considering the position for the year 1968, came to the conclusion that all the children from the Roman Catholic primary schools could comfortably be accommodated in the Roman Catholic secondary schools, with room to spare; but that the children from non-Roman Catholic primary schools could not be accommodated in the non-Roman Catholic secondary schools. At any rate, there would be such a tight squeeze that they could not find room for the children from Roman Catholic primary schools. In those circumstances, in January 1968, the education authority sent out a circular to all the

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<b>CRIMINAL LAW</b> – Costs – Payment by convicted person – Order not to be made unless defendant has private capital. <b>R v Gaston</b> .. .. .	CA 157 ftnt.
<b>CRIMINAL LAW</b> – Dangerous drug – Possession – Evidence – Minute quantity of drug found on analysis. <b>R v Marriott</b> .. .. .	CA 165
<b>CRIMINAL LAW</b> – Duress – Defence to offence – Essential elements – Neutralising will of defendant – Circumstances to be taken into account. <b>R v Hudson. R v Taylor</b> .. .. .	CA 407
<b>CRIMINAL LAW</b> – Evidence – Confession – Defendant informed that third person has accused him of offence – No explanation or disclaimer. <b>Hall v Reginam</b> .. .. .	PC 141

<b>CRIMINAL LAW</b> – Evidence – Cross-examination of co-prisoner on character – Evidence given by co-prisoner against prisoner – Charged 'with the same offence' – 'Same offence' – Possession by two prisoners of forged notes not joint but immediately successive – Criminal Evidence Act, 1898, s 1 (f), proviso (iii). <b>R v Russell</b> .. .. .	CA	78
<b>CRIMINAL LAW</b> – Evidence – Electronic tape recording – Proof by prosecution of originality. <b>R v Stevenson</b> .. .. .	Assizes	174
<b>CRIMINAL LAW</b> – Evidence – Witness – Right to refresh memory – Prosecution witness – Previous statement to police – Statement not contemporaneous with but soon after events in question – Great delay before trial – Statement read by witness soon before trial – Course suggested by prosecution – Propriety. <b>R v Richardson</b> .. .. .	CA	371
<b>CRIMINAL LAW</b> – Forcible detainer – Peaceable entry – Property entered fortified to defeat attempt at eviction – Trial on indictment – Forcible Entry Act, 1429. <b>R v Mountford</b> .. .. .	CA	250
<b>CRIMINAL LAW</b> – Forgery – Acknowledging a recognisance in the name of another – Recognisance not demanded by person lawfully authorised – Forgery Act, 1861, s 34. <b>R v McKenzie</b> .. .. .	Assizes	26
<b>CRIMINAL LAW</b> – Impeding apprehension or prosecution – Assisting offender – Ingredients of offence – Need for knowledge of identity of principal offender – Criminal Law Act, 1967, s 4 (1). <b>R v Brindley; R v Long</b> .. .. .	CA	357
<b>CRIMINAL LAW</b> – Jurisdiction – Offences initiated abroad. See <i>Treacy v Director of Public Prosecutions</i> , p. 112, and <i>R v Baxter</i> , p. 345.		
<b>CRIMINAL LAW</b> – Obtaining pecuniary advantage by deception – Betting transaction – Operative inducement – Theft Act, 1968, s 16 (2) (a) (c). <b>R v Aston. R v Hadley</b> .. .. .	CA	89
<b>CRIMINAL LAW</b> – Obtaining pecuniary advantage by deception – Evasion of debt – Evasion of payment of debt basis of offence – Worthless cheque – Representations by drawer – Theft Act 1968, s 16 (2) (a). <b>R v Page</b> .. .. .	CA	376
<b>CRIMINAL LAW</b> – Obtaining property by deception – Attempt – Fraudulent claim posted abroad – Letter received by addressee in England – Theft Act 1968, s 15 (1). <b>R v Baxter</b> .. .. .	CA	345
<b>CRIMINAL LAW</b> – Road Traffic offences. See <b>ROAD TRAFFIC</b> infra.		
<b>CRIMINAL LAW</b> – Sentence – Extended term of imprisonment – Not to comprise suspended sentence – Suspended sentence not to run consecutively to extended term – Matters appropriate to be considered in fixing length of extended term – Criminal Justice Act 1967, s 37. <b>R v Roberts</b> .. .. .	CA	415
<b>CRIMINAL LAW</b> – Sentence – Extended term of imprisonment – Propriety of term starting on expiration of ordinary sentence of imprisonment. <b>R v Stewart</b> .. .. .	CA	402
<b>CRIMINAL LAW</b> – Sentence – Suspension – Act providing minimum sentences for specified offences – Power of court to suspend sentence – Criminal Justice (Temporary Provisions) (Northern Ireland) Act, 1970, s 1 – Treatment of Offenders (Northern Ireland) Act, 1968, s 18 (1). <b>Kennedy v Spratt</b> .. .. .	HL	203
<b>CRIMINAL LAW</b> – Theft – Ingredients of offence – Consent of owner obtained by dishonesty – Facts proved justifying conviction of obtaining property by deception – No bar to conviction for theft – Theft Act, 1968, s 1 (1), s. 2 (1) (b), s 15 (1). <b>R v Lawrence</b> .. .. .	CA	144
<b>CRIMINAL LAW</b> – Theft – Ingredients of offence – Intention of permanently depriving another of property – Direction to injury – Theft Act, 1968, s 1 (1), s 6. <b>R v Warner</b> .. .. .	CA	199
<b>CRIMINAL LAW</b> – Theft – Possession or control – No qualification of words in statute – Possession or control in fact sufficient – Removal of car by owner from near garage where left for repairs – Dishonesty – Belief in claim of right – Theft Act 1968 (c 60) s 2 (1), s 5 (1). <b>R v Turner</b> .. .. .	CA	419
<b>CRIMINAL LAW</b> – Venue – Indictable offence – Place where defendant 'in custody' – 'Custody' – Criminal Justice Act, 1925, s 11 (1). <b>R v Kulynezy</b> .. .. .	CA	82

parents whose children were going to begin their secondary education in September 1968. I will read the two paragraphs which state the policy of the education authority:

'It is emphasised that pupils who attend Roman Catholic primary schools will be considered only for Roman Catholic secondary schools, so that parents of these children will *not* be able to opt for maintained county secondary schools. This is because, in the long term, maintained county secondary comprehensive schools will only have sufficient accommodation for pupils from county and Church of England primary schools.'

Together with the circular, there was a form for each parent to fill in. It contained two lists: one on the right which was the Roman Catholic secondary schools; and the other on the left, which was the non-Roman Catholic secondary schools. There was a statement on the top stating:

'The schools providing secondary academic or technical courses are listed below. Those on the right-hand side are available *only* for candidates attending Roman Catholic Primary Schools; and those on the left are available *only* for candidates attending non-Roman Catholic Primary Schools. Please insert a figure 1 in the square opposite the school which is your first choice, a figure 2 in the square opposite the school which is your second choice, and so on.'

It is clear from those documents that the policy of the education committee in allocating children to the secondary schools was that the children from the Roman Catholic primaries ought to go to the Roman Catholic secondaries; and those from the non-Roman Catholic primaries should go to the non-Roman Catholic secondaries. But this was not an absolute decision. It was only provisional. The circular showed that there was a procedure for exceptional cases. It stated:

'Applications for pupils to attend secondary schools other than those to which they have been allocated will be considered *only* in *exceptional* cases and then only if there is accommodation in the alternative school when all the requirements of children within its area have been satisfied.'

Such being the policy, I give an instance showing how it was applied. Mr and Mrs Cumings had their son Peter, who went to a Roman Catholic primary school. When it came to the time for him to go to a secondary school, his parents filled in the form for a Roman Catholic secondary school and he went to it. But a year later they were advised by someone that the policy of the education authority was unlawful. So his parents applied for him to go to a non-Roman Catholic secondary school. The education authority looked into his case and refused the application. It was not because of his religion, but simply because he was below some other applicants in his attainments. So he had to remain at his original Roman Catholic secondary school. Eventually, however, a writ was issued on behalf of Mr Cumings and two other parents against the county borough of Birkenhead. It was claimed that the borough authority had acted unlawfully in that they had segregated the children into two categories of Roman Catholic and non-Roman Catholic. It was claimed that their action was invalid, and sought a declaration accordingly. The borough put in a defence in which they denied that they had done anything irregular in any way. They stated that in any case this was not a matter of which complaint could be made to the courts of law, and that the only remedy was by way of representations to the Minister under ss 99 and 68 of the Education Act 1944. This was set down as a preliminary point of law. UNGOED-THOMAS J upheld the borough's contention. Now the parents appeal to this court.

Counsel for the parents put forward two propositions to which counsel for the education authority did not take any exception. The first proposition was that, in

the light of all the sections of the Act, the local education authority have a power and a duty to allocate the particular pupils in their area to particular schools. That proposition is clearly right. The education authority may have a thousand pupils to spread over three or four schools. It must necessarily be for the education authority to make the allocation, sending each child to the school which is thought to be best for him. They will have regard, of course, as s 76 states, to the wishes of the parents, but that is only one consideration among many. The second proposition was that, seeing there is a power and duty of allocation, it must be exercised on the basis of a proper administrative discretion. That proposition is also right. It is well settled that, when a public authority is given an administrative discretion, it must exercise its discretion fairly. It must be guided by relevant considerations and not by irrelevant considerations. Such is established by *Padfield v Minister of Agriculture, Fisheries and Food* (1); cf *Breen v Amalgamated Engineering Union* (2).

Stopping there, however, I would have thought that, in case of a wrong exercise of their discretion, the only remedy is that given by statute. If the education authority fail to discharge a duty which is imposed on them by the Act, a remedy is given by s 99 of the Act. If the education authority are acting or proposing to act unreasonably in regard to the execution of their duties, then again a remedy is given by s 68 of the Act. In either case the person aggrieved can apply to the Minister. Counsel for the parents realises the force of the argument in those sections. So he puts forward the proposition that in this case the education authority are not merely exercising their discretion wrongly. They are acting beyond their powers, or, in Latin, *ultra vires*. If that were the case, then this court would interfere. The courts will always interfere if a Minister or county borough or any other body is acting beyond the powers conferred on it by law.

The first way in which counsel for the parents suggests *ultra vires* is this. He says that the education authority are acting in breach of s 76 of the Education Act 1944 which provides:

'local education authorities shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents.'

Counsel for the parents says that, by issuing the circular the education authority were disregarding the wishes of the parents altogether. I do not agree. We considered a similar point in 1955 in *Watt v Kesteven County Council* (3). We then pointed out that the wishes of the parents are only one thing. There are many other things to which the education authority may have regard and which may outweigh the wishes of the parents. They must have regard, for instance, not only to the wishes of the parents of one particular child, but also to the wishes of the parents of other children and of other groups of children. In this particular case, the education authority were having regard to the wishes of those parents who had had their children at Roman Catholic primary schools, and also the wishes of those at other schools. The education authority were doing the best they could to allocate places as between the various groups of parents for whom they had to cater. That is quite legitimate. There is no warrant for the suggestion of a breach of s 76. The second way in which counsel for the parents suggested that the education authority was acting *ultra vires* was this. He said that they were not exercising the discretion which was given to them. They were fettering it by laying down a policy as to which pupils should go to which

(1) [1968] 1 All ER 694; [1968] AC 997.

(2) [1971] 1 All ER 1148.

(3) 119 JP 220; [1955] 1 All ER 473; [1955] 1 QB 408.



secondary schools, and applying that policy regardless of the parents' wishes. He relied on a recent decision of WILLIS J: *H Lavender & Son Ltd v Minister of Housing and Local Government* (1). I desire to say at once that it is perfectly legitimate for an administrative body such as this, an education authority, to lay down a general policy which it proposes to adopt in the cases coming before it: see *Stringer v Minister of Housing* (2) and *British Oxygen Co Ltd v Minister of Technology* (3). One of the best-known cases is that of the married women teachers. The education authority of Poole laid down as their policy that 'the retention of married women teachers is inadvisable and they recommend that notice be given' to them to terminate their employment. The reason was because they had more than enough single women teachers, and they thought that the married women ought to be looking after their domestic affairs. One of the married women teachers, who had been dismissed, challenged this policy, saying that it was invalid. This court held that it was valid: see *Short v Poole Corp'n* (4). WARRINGTON LJ, in a familiar passage, stated the circumstances in which a policy might be held ultra vires:

'It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any act which would be held ultra vires under this head, though performed bona fide. To look for one example germane to the present case, I suppose that if the defendants were to dismiss a teacher because she had red hair, or for some equally frivolous and foolish reason, the court would declare the attempted dismissal to be void.'

So, here, if this education authority were to allocate boys to particular schools according to the colour of their hair or, for that matter, the colour of their skin, it would be so unreasonable, so capricious, so irrelevant to any proper system of education that it would be ultra vires altogether, and this court would strike it down at once. But, if there were valid educational reasons for a policy, as, for instance, in an area where immigrant children were backward in the English tongue and needed special teaching, then it would be perfectly right to allocate those in need to special schools where they would be given extra facilities for learning English. In short, if the policy is one which could reasonably be upheld for good educational reasons, it is valid. But, if it is so unreasonable that no reasonable authority could entertain it, it is invalid: see the judgment of LORD GREENE MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp'n* (5). Applying those considerations in the present case, it is quite impossible to suggest that the education authority have gone outside their powers. They have laid down a policy and given good reasons for it. They have said: 'We have not enough room for all comers; so for the time being, those who come up from the Roman Catholic primary schools should go into the Roman Catholic secondary schools, where there is ample room; and not go into the non-Roman Catholic secondary schools where there is not enough room'. That is a sound administrative policy decision to which no objection can be taken, especially when it is realised that in exceptional cases the authority are ready to reconsider the position of any particular pupil.

In my opinion, there is no ground for saying that the education authority have acted beyond their powers. If they have done anything wrong at all—I do not suggest that they have—it is not a matter which comes within the jurisdiction of

(1) [1970] 3 All ER 871.

(2) [1971] 1 All ER 65.

(3) [1970] 3 All ER 165.

(4) 90 JP 25; [1926] Ch 66; [1925] All ER Rep 74.

(5) 112 JP 55; [1947] 2 All ER 680; [1948] 1 KB 223.



these courts. If complaint is to be made, it should be made to the Minister, and not to us. I think that the judge was right, and I would dismiss this appeal.

**FENTON ATKINSON LJ:** I agree.

1. In January 1968, when the Birkenhead education committee sent out the letter of which the first plaintiff complains, they foresaw that by September 1968 all available vacancies at the county secondary comprehensive schools would be required for pupils from county and Church of England primary schools whose parents would not normally wish them to go to Roman Catholic secondary schools. At the same time the education authority also foresaw that in September there would be sufficient vacancies in the Roman Catholic secondary schools for pupils coming up from Roman Catholic primary schools, whose parents would not normally wish them to go to the county secondary comprehensive schools. Faced with that administrative problem, calling for a policy decision, the education authority sent out the letter of January 1968 containing the paragraph which has given rise to these proceedings, stating clearly a reason for that decision, and indicating in para 5 of the letter that they were willing to consider at a later stage re-allocation in exceptional cases.

2. It is now contended that this was not a proper exercise of their administrative discretion. It is not suggested they did not act bona fide, and it is not now suggested that they acted arbitrarily or capriciously (although at one stage I am bound to say I had understood counsel for the first plaintiff to be saying that the decision to limit the choice of parents of children at the Roman Catholic primary schools in the manner indicated was about as unreasonable as saying that any child who lived in a house painted green must go to a school painted the same colour).

3. The complaint is that they did not exercise an individual discretion considering each child, but that they acted ultra vires in that, by coming to this policy decision, they have fettered their discretion in dealing with individual cases in advance; and even though it may well have seemed to them that their policy decision was likely to fulfil the wishes of the overwhelming majority of parents, it is said that that was something wholly unreasonable and indeed ultra vires. But I cannot accept that submission. It seems to me that, in the conditions foreseen in January 1968, it would have been really pointless to allow the parents of children at the Roman Catholic primary schools to opt for non-Roman Catholic secondary schools when there seemed no possibility at all of being able to give effect to such a choice if it were made; and for my part I can see no reason at all for thinking the education authority unreasonable in acting as they did, and the submission that their action was so unreasonable as to be ultra vires seems to me, with respect, to be plainly wrong.

If the first plaintiff still feels that he has genuine cause for complaint, then he has his remedy under s 68 of the Education Act 1944, but I am satisfied that he is not entitled to the relief sought in this action.

**SIR GORDON WILLMER:** I agree with both the judgments which have been delivered.

*Appeal dismissed.*

Solicitors: *Markbys*, for *D P Roberts & Co*, Birkenhead; *Sharpe, Pritchard & Co*, for *Ian G Holt*, Birkenhead.

G.F.L.B.

**QUEEN'S BENCH DIVISION**

(BEFORE LORD PARKER, CJ, WIDGERTY, LJ, AND BRIDGE, J)

30th March 1971

R v TOWER BRIDGE MAGISTRATE. Ex parte OSMAN

*Quarter Sessions—Committal for sentence—Gravity of offence apparent from nature of charge—Nothing emerging from facts stated by prosecution to increase gravity of offence—Magistrates' Courts Act, 1952, s 29.*

The applicant appeared before a stipendiary magistrate on three charges of theft. The prosecution asked for summary trial. The magistrate considered that the value of the property stolen was small and that the case was not of such gravity as needed trial by judge and jury. After the necessary formalities had been completed, the applicant consented to summary trial and pleaded guilty. The only fresh matter that emerged in the statement of the case by the prosecution was that the applicant had committed the offences against his employer. The applicant was proved to be of good character, and the magistrate would have been obliged to suspend the sentence, even if he felt that the case was one which called for imprisonment. A number of cases of pilfering by employees from the same employer had previously been dealt with by the magistrate. The magistrate, being of opinion that the case was one which called for immediate imprisonment, committed the applicant to quarter sessions for sentence under s 29 of the Magistrates' Courts Act, 1952. The applicant was sentenced by quarter sessions to imprisonment. On an application by the applicant for certiorari to quash the order of the magistrate committing him for sentence.

HELD: the gravity of the offences was patent to the magistrate on the face of them, nothing emerged from the facts stated by the prosecution which enhanced their gravity or reflected on the character of the applicant more than was reflected in the charges themselves; and, therefore, the magistrate had no power to commit for sentence under s 29; his proper course, if he felt that an immediate sentence and imprisonment was necessary was to continue to act as an examining magistrate and commit, not for sentence, but for trial; and certiorari would issue.

*Magistrate—Summary trial of indictable offence—Inquiry into gravity of offence*

Per BRIDGE, J: The foundation of the jurisdiction of justices under s 19 (2) of the Magistrates' Courts Act, 1952, to deal summarily with indictable offences requires that it should have appeared to them, inter alia, that the circumstances of the offence are not of such a serious character as to require trial on indictment. If full and adequate inquiry were made at the proper stage to lay the foundations of that jurisdiction, difficulties as to the scope of s 29 would not arise.

MOTION for certiorari by Shener Osman to remove into the High Court for the purpose of its being quashed an order made under s 29 of the Magistrate's Courts Act 1952 by a metropolitan magistrate sitting at the Tower Bridge Magistrates' Court on 27th November 1971 committing the applicant to Inner London Sessions for sentence. The applicant was later sentenced by quarter sessions to two years' imprisonment.

W R Rees-Davies for the applicant.

The respondent was not represented.

**LORD PARKER CJ:** In these proceedings counsel moves on behalf of the applicant, one Shener Osman, for an order of certiorari to bring up and quash the applicant's committal by a stipendiary magistrate sitting at the Tower Bridge Magistrates' Court under s 29 of the Magistrates' Courts Act 1952 on 27th November 1970. The applicant was before the stipendiary magistrate at the Inner London Area,

South Central Division sitting at Tower Bridge Magistrates' Court on three charges. They were all allegations of pilfering from the Bricklayers Arms Goods Depot of British Railways, the charge being one of theft of certain articles in each case between certain dates. In fact the thefts of a number of different articles were alleged to have occurred over a long period from 1st January 1970 to 23rd November 1970. The prosecution asked for summary trial. The learned magistrate said that he considered that the value of the property stolen was small, and that the case was not of such gravity as needed trial by judge and jury. The necessary formalities were gone through; the applicant consented to summary trial and pleaded guilty. Thereupon the prosecution recounted the nature of the offences. The only thing that emerged from the statement of the prosecution which was not made specific in the charges themselves and which could be said to have increased their gravity, was the fact that the applicant was himself an employee of British Railways. At the end of the case, the magistrate found that the applicant was of good character. He was undoubtedly faced in those circumstances with the fact that even if he decided that it was a case for imprisonment, he would have to suspend the sentence. He had apparently been troubled in the past with a number of cases of pilfering by employees from this very depot of British Railways. He came to the conclusion that the proper sentence was one of immediate imprisonment, and in those circumstances committed the applicant for sentence under s 29 of the Magistrates' Courts Act 1952.

Counsel for the applicant urges that there is nothing which emerged in the course of the trial throwing light on the gravity of the offences which really did not appear in the charges themselves. As I have already said, the charges did not allege larceny by a servant because under the Theft Act 1968 now merely a theft is alleged. But it was perfectly patent to anybody who read the charges, and in particular this magistrate, who had had this trouble with this depot in the past, and particularly when the thefts were alleged to have occurred over such a long period, that this was a typical case of pilfering by an employee of the railways. In those circumstances, as it seems to me, if he felt that in the light of his experience in the past that an immediate sentence would be necessary, there was no other course for him but to continue to act as an examining magistrate and commit not for sentence but for trial.

Counsel has quite rightly drawn the attention of this court to what was said in *R v King's Lynn Justices, ex parte Carter* (1). Speaking for myself as a member of the court that decided that case, I was very conscious of the fact that that case might be looked on, as it were, as a charter for magistrates to deal with certain cases summarily rather than commit for trial, because they could commit for sentence under s 29 of the Magistrates' Courts Act 1952. As I have said, I was very conscious of that danger, but the case was a very special one in this respect, that, although it was a serious charge, a charge of stealing some £4,000 worth of ladies' garments, the gravity of the case was not revealed until the case for the prosecution was opened, when it was found that these thefts had been going on over a very long period. Indeed, if only one, and perhaps the last, occasion, of theft had been charged and the other cases were taken into consideration, there would have been no doubt whatever that what had been revealed in the trial, namely, the other cases of theft, would be proper to be taken into consideration in order to enable the magistrate to commit for sentence. That was the course taken in the special circumstances of that case.

When one comes, however, to the present case, it is not a question of something more being revealed in the prosecution case which enhanced the gravity of the offences. Here the gravity of the offences was undoubtedly to this magistrate patent on the very face of them, and nothing, in my judgment, emerged during the facts as stated by the prosecution that made it more grave than it already was. In

those circumstances, accepting fully the decision in *R v King's Lynn Justices, ex parte Carter* (1), there was nothing revealed which reflected on the character of the applicant more than was reflected in the charges themselves. I am quite clear for my part, and I say this, having been a member of the court that decided *R v King's Lynn Justices, ex parte Carter*, that in the present case there was no power in the magistrate to commit for sentence, and, accordingly, I would quash the committal.

**WIDGERY LJ:** I agree.

**BRIDGE J:** I also agree. I would only add a short word because of the danger, of which LORD PARKER CJ has spoken, that *R v King's Lynn Justices, ex parte Carter* may mislead magistrates' courts, and to save them succumbing to the temptation not to make adequate enquiry into the circumstances of the case at the proper stage when such enquiry should be made under s 19 of the Magistrates' Courts Act 1952, the justices should be mindful of the fact that the foundation of their jurisdiction to deal summarily with indictable offences requires that it should have appeared to them, inter alia, that the circumstances of the offence are not of such a serious character as to require trial on indictment. Here the nature of the case is such that the punishment that the court has power to inflict would be adequate; if full and adequate enquiry were made at that stage, as it should be, to lay the foundation of the magistrates' courts' jurisdiction to try indictable offences summarily, the difficulties arising as to the scope of s 29 of the Magistrates' Courts Act 1952 would not arise.

*Order for certiorari.*

Solicitors: *Silkin, Silkin, Pearce & Sons.*

T.R.F.B.

(1) 133 JP 83; [1968] 3 All ER 858; [1969] 1 QB 488.

### QUEENS BENCH DIVISION

(LORD PARKER, CJ, WIDGERY, LJ, AND BRIDGE, J)

31st March 1971

**R v CRIMINAL INJURIES COMPENSATION BOARD; Ex parte SCHOFIELD**

*Criminal Injuries Compensation—Right to compensation—Chase of suspected thief—Bystander accidentally knocked down and injured—Bystander not arresting or assisting in arrest—Compensation for Victims of Crimes of Violence Scheme, 1964, para 5 (a).*

The applicant was about to enter a multiple store. While she was near the door, a man suspected and later convicted of shoplifting and a store detective pursuing him ran out of the store and one of these men knocked her to the ground and injured her. She herself was not trying to arrest or assist the arrest of the suspected person. An application made by her to the Criminal Injuries Corporation Board under para 5 (a) of the scheme for the compensation of victims of crimes of violence was refused by the board on the ground that at the time of her injuries she had not been effecting or attempting to effect an arrest, but was merely a bystander who had been accidentally knocked down. On an application by the applicant for an order of certiorari to quash the decision of the board,

**HELD:** (BRIDGE, J dissenting) (i) that there was nothing in the first three categories of claimants in para 5 (a) to limit claims for compensation to the actual intended victim of

a crime, the person actually arresting or attempting to arrest an offender, or the person preventing or attempting to prevent an offence; (ii) the specific addition in the fourth category of persons 'giving help to a constable' did not indicate an intention to restrict the categories of persons entitled to compensation; certiorari therefore, must issue.

MOTION by Betty Schofield for an order of certiorari to bring up and quash a decision of the Criminal Injuries Compensation Board by which the board held that she was not entitled to compensation for personal injuries sustained by her.

*P J Crawford* for the applicant.  
*Gordon Slynn* for the board.

**LORD PARKER CJ:** In these proceedings counsel moves on behalf of the applicant for an order of certiorari to bring up and quash a decision of the Criminal Injuries Compensation Board delivered as long ago as 1st August 1969. The ground on which the motion is moved is that the decision discloses on its face an error of law. In passing I should mention, as appears from the date to which I have referred as the date of the decision, a very long time has elapsed, but this court on a previous occasion has extended the time within which this motion can be moved.

The short facts giving rise to the claim were that the applicant happened to be out shopping one day, and about to enter a multiple store. As she did so, two men ran out of the store. One, as it turned out, was a store detective who was following and attempting to arrest another man whom he suspected of shoplifting, and who indeed later was arrested, charged and convicted of shoplifting. One of these two men knocked her to the ground in passing as a result of which she suffered injury. The board in its decision said that it was not plain which of the two men it was who knocked her to the ground, but in their view, and indeed in my view also, it was immaterial.

The board administer a scheme which provides in para 5, so far as it is material:

'The board will entertain applications for ex gratia payment of compensation in those cases where:—(a) the applicant, or, in the case of an application by a spouse or dependant . . . the deceased, suffered personal injury directly attributable either to a criminal offence or to an arrest or attempted arrest of an offender or suspected offender or to the prevention or attempted prevention of an offence or to the giving of help to any constable who is engaged in arresting or attempting to arrest an offender or suspected offender or preventing or attempting to prevent an offence, where such injury occurs in Great Britain or on a British vessel or aircraft . . .'

The board rejected the application made by the applicant, who claimed, to use the words of the scheme, that she had 'suffered personal injury directly attributable . . . to an arrest or attempted arrest of an offender'. They rejected that on two grounds. The first ground was that on a proper reading of the relevant words of the scheme, the only applicant who could claim compensation in respect of an arrest or an attempted arrest was an applicant who had himself or herself effected the arrest or attempted the arrest. Here, as the board says, this was merely a case of the applicant happening to be there as a bystander and being knocked accidentally to the ground by one of these men. The second ground on which they rejected the claim, which was an alternative ground, was that in any event the applicant's injuries were not directly attributable to the arrest. They put it in this way:

'One of the consequences of the arrest of the offender by the store detective was that the applicant was accidentally knocked down. Her injuries were, in our view, indirectly attributable to the arrest of an offender but they were not directly attributable to the arrest.'



Turning to the first point, it is clear that para 5 (a) which I have already read, provides for compensation being paid in four separate sets of circumstances: (i) where the injury suffered was directly attributable to a criminal offence; (ii) where the injury suffered was directly attributable to an arrest or attempted arrest of an offender or suspected offender; (iii) where the injury suffered was directly attributable to the prevention or attempted prevention of an offence; and (iv) where the injury suffered was directly attributable to the giving of help to any constable who is engaged in arresting or attempting to arrest an offender or suspected offender or preventing or attempting to prevent an offence.

What is urged by counsel for the applicant is that the first three categories, as he would put it, plainly cover somebody who is accidentally present. So far as the criminal offence is concerned, there is no limitation to cover only the intended victim. It may be somebody who was present and who was accidentally injured. So, he says, when one gets to categories (ii) and (iii), there is nothing in the wording there to limit the cases for compensation to cases where the applicant has himself or herself arrested or attempted to arrest. He points out that the words used 'an arrest or attempted arrest' are about as wide as they can be, and do not say what might well have been provided for on the rival construction; they do not provide for injury directly attributable to his or her arrest or attempted arrest of an offender. In other words, he submits that, if Parliament had intended to provide that limitation, it was easy enough to say so.

The argument on the other side advanced by counsel for the board centres round the fourth category. He says, and he says with some force, that on counsel for the applicant's wide construction of the second and third categories, then the fourth category was mere surplusage. Spelling that out in a little more detail, counsel for the board would say: category (ii) on the wide construction will cover the applicant who is not only a bystander, but who has himself sought to arrest, and indeed the applicant who has given somebody else help to effect the arrest. Accordingly, so says counsel, category (iv) is mere surplusage.

For my part, I find these arguments very evenly balanced. There is no doubt that it is wrong to approach para 5 as if it was contained in a statute. The words are imprecise, but in the end I am by no means satisfied, first, that category (iv) is surplusage on the wide construction given by counsel for the applicant to categories (ii) and (iii); nor am I satisfied, bearing in mind that we are not construing the words of a statute, that an argument here based on possible surplusage is sufficient to limit the wide construction which one would normally give to words such as 'injuries directly attributable to an arrest' simpliciter.

One cannot shut one's eyes to the fact that category (iv) is no doubt a typical case in which an applicant should be entitled to receive compensation, and it may well be that in a document such as this it was thought wise to put in specifically what was thought to be the common case in which compensation would be paid without thereby intending in any way to interfere with the plain construction in regard to the other categories. On the whole I have come to the conclusion that the decision of the board in this regard does disclose an error of law, and accordingly I would quash the decision.

Having said that, it becomes clear that it is strictly unnecessary to deal with the second point. It has, however, been fully argued and I think it only right to say that for myself I am quite satisfied that if the construction for which counsel for the applicant contends in regard to what has been called category (ii) is right, then undoubtedly the applicant's injuries were directly attributable to the arrest. Indeed counsel for the board in the end very frankly said that he did not feel that he could argue to the contrary. Quite shortly in my judgment 'directly attributable' here



is intended to refer in lay terms to a *causa causans* as opposed to a *causa sine qua non*; that indeed was the view taken by the LORD JUSTICE-CLERK (LORD ALNESS) in a Scottish case of *MacGregor v Board for Agriculture of Scotland* (1) where it became necessary to construe those words 'directly attributable' appearing as they did in s 10 of the Agriculture Act 1920.

Accordingly, one approaches this matter to see whether the knocking down in the course of the arrest was a cause of the applicant's injuries. In my view, it certainly was a cause, and indeed was the only cause, because it could not be said that her presence accidentally, about to go into the shop, was in any way a cause at all. As I have said, this is unnecessary strictly to the decision, which is that in regard to the first point the board erred in law. I would quash this decision.

**WIDGERY LJ:** I agree, having had the same difficulties en route to a decision as those referred to by LORD PARKER CJ. When one looks at the terms of para 5 of the scheme, the essential words appropriate to the present case are these:

'The board will entertain applications for *ex gratia* payment of compensation in those cases where:—(a) the applicant . . . suffered personal injury directly attributable . . . to an arrest or attempted arrest of an offender . . .'

Those words in their plain and ordinary meaning seem to me clearly to embrace the situation of the applicant in the present case. I too agree that her injury was directly attributable to the arrest, and accordingly on the ordinary meaning of the words which I have read, her case would seem to be embraced in the paragraph.

My difficulties have all centred around the concluding words, referring as they do to the payment of compensation to a person suffering personal injury directly attributable to the giving of help to a constable in effecting an arrest. Those words seem to be drawing a distinction between someone making an arrest and someone helping another to make an arrest. They seem to imply that, but for the special inclusion of the last phrase, a person helping another would not be within the terms of the paragraph, and they also point to the fact that even in its present form the paragraph only embraces those who help another to make an arrest if the other is a constable. If the effect on the paragraph as a whole is to draw a distinction between those who arrest and those who help, it would be a strong argument, in my judgment, against the wide interpretation for which counsel for the applicant contends. In the end I have come to the conclusion that the words referring to assistance given to a constable can be explained in other ways, and do not necessarily bring one to the conclusion that a narrow interpretation of the clause generally is required.

I think, although it must be in large measure a matter of speculation, that the reference to helping a constable may have been put in to cover the situation of a person who, remote from the fray and the attempted arrest, nevertheless decides to go in and offer his assistance. I can see that it might be found arguable, apart from the concluding words of the paragraph, that such a person has brought the consequences on himself, and that his injury was not directly attributable to the arrest. The possibility that that was the motive which caused the draftsman to include the final phrase in para (a) satisfies me in the end that we should give the original words their plain and ordinary meaning to which I have referred. I would also quash the order.

**BRIDGE J:** I have the misfortune to have arrived at a different conclusion. I need hardly say that I do so with regret and with diffidence. This court decided in *R v Criminal Injuries Compensation Board, ex parte Lain* (2) that *certiorari* lies to quash

(1) 1925 SC 613.

(2) [1967] 2 All ER 770; [1967] 2 Q.B. 864.

a decision of the board. Accepting that, as I am bound to do, I still think that one must bear in mind that the scheme, as the document is entitled which enshrines the rules for the board's conduct, is not recognisable as any kind of legislative document with which the court is familiar. It is not expressed in the kind of language one expects from a Parliamentary draftsman, whether of statutes or statutory instruments. It bears all the hall marks of a document which lays down the broad guidelines of policy. It contains in para 4 these words:

'The board will be entirely responsible for deciding what compensation should be paid in individual cases and their decisions will not be subject to appeal or to Ministerial review. The general working of the scheme will, however, be kept under review by the government, and the board will submit annually to the Home Secretary and the Secretary of State for Scotland a full report on the operation of the scheme, together with their accounts. The report and accounts will be open to debate in Parliament . . .'

That reflects the consideration no doubt that in the operation of the scheme, in the day-to-day consideration of applications, inevitably, within the broad guidelines laid down by the scheme itself, the board's decisions are constantly shaping the policy more precisely, and if the executive, who are wholly responsible for the form of the scheme and can change it any day in the week by a written answer to a Parliamentary question, do not think that the board is shaping the policy in the right way, then a suitable amendment of the scheme can be made without any of the difficulties which accompany amendments to legislation properly so called. It is against that background that I approach the problem of construction of para 5 (a), and against that background it seems to me that it would be wrong for this court to intervene and say that the board has misconstrued the scheme unless it is very clear that that is the only tenable view.

The board states in the crucial paragraph in its decision in this case:

'The purpose of the Scheme is to compensate those who try to arrest an offender or who try to prevent the commission of a crime, or who assist a constable to do either or these things. It does not in our view cover bystanders who are accidentally injured by anyone who is engaged in the task of arresting an offender.'

I ask myself the question, in the light of the language of this policy document: is that a reasonably tenable view? If it is, for the reasons which I have sought to explain earlier, it does not seem to me right that the court should say that the view was wrongly adopted. On the language of para 5 (a) in my judgment the view is more than reasonably tenable. In my judgment, it is the preferable view of the construction of the paragraph, although I fully appreciate the force of the argument of LORD PARKER CJ and WIDGERY LJ who adopt the other construction. Approaching the matter with reference to the four categories as enumerated by LORD PARKER and WIDGERY LJ, I start with category (i), and I accept of course that a person who is not the intended victim of a crime of violence would be entitled to compensation. He would still be a 'victim' and it will be remembered that the scheme is headed 'Compensation for Victims of Crimes of Violence'. If a person intending grievous bodily harm to one person misses his mark and causes grievous bodily harm to a bystander, it is immaterial to the nature and quality of the crime, but I do not find, with respect to LORD PARKER's and WIDGERY LJ's view, that consideration of any assistance when one comes to categories (ii) to (iv). To my mind there is no satisfactory answer to counsel for the board's argument that category (iv) is really otiose if categories (ii) and (iii) have the wide meaning attributed to them by counsel for the applicant's argument. True one can visualise a possible situation, in my view a rather remotely possible

situation, in which it could conceivably be said that a person who went to the assistance of a constable effecting an arrest or preventing an offence and was injured in the process, might not be able to claim on the wide construction that his injury had been directly attributable to the attempted arrest or to the prevention of the offence under categories (ii) and (iii). But I find it difficult to suppose that it is to cover only that remote contingency that this category (iv) was included. It seems to me much more natural to suppose that category (iv) has been included because in each of categories (ii), (iii) and (iv) it is presupposed that the claimant must be the person making the arrest or attempting to make the arrest, preventing the arrest or attempting so to do or giving assistance to a constable engaged in one or other of those activities.

Of course, it follows from LORD PARKER's and WIDGERY LJ's decision that now the scheme will entitle persons to claim compensation provided that their injuries are directly attributable to those activities including the activity of one giving help. So by seeking to protect a person who goes to the assistance of the constable, the draftsman of the scheme has brought in someone, for example, who may be knocked down as the would-be assistant of the constable is running to his assistance. I cannot resist the conclusion that this widens the scheme beyond the scope that it was intended to have. For my part, I would refuse this application.

*Order for certiorari.*

Solicitors: Gibson & Weldon, for Stanley Evans & Co, Manchester; Treasury Solicitor.

T.R.F.B.

# QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, WIDGERY, LJ, AND BRIDGE, J)

1st and 2nd April 1971

COOPER AND OTHERS v SHIELD

*Public Order—'Public place'—Using threatening behaviour—Railway station platform—Public Order Act 1936 (1 Edw 8 & 1 Geo 6 c 6), ss 5, 9.*

By s 5 of the Public Order Act 1936: 'Any person who in any public place . . . (a) uses threatening, abusive or insulting words or behaviour . . . with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.' By s 9 'Public Place' means any highway, public park or garden, any sea beach, and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not; and includes any open space to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise.

Since the opening words in the definition of 'public place' in s 9 do not refer in any case to buildings, the words 'open space' must refer to a place which does not constitute a building and is not an integral part of one. Accordingly, a railway station platform, which forms an integral part of the station building, is not an 'open space' within the definition and cannot be a 'public place' within s 5.

SEMBLE: it is perfectly apt to describe a racecourse or a football ground with stands as an 'open space' notwithstanding that these are buildings incidental to the use of the open space.

CASE STATED by Cheshire Quarter Sessions.

On 17th August 1970 the quarter sessions allowed appeals by the respondents, Thomas Anthony Cooper, James Joseph Kehoe, Gerard Murphy, Jeffrey David Sheldon, Bernard Michael Upton, Christopher Aspinall, Keith Stewart, Kevin McDonnell and Stephen Thomas Weaver, against their convictions by Bromborough

Magistrates' Court on 19th June 1970, of using threatening behaviour at West Kirby railway station, whereby a breach of the peace was likely to be occasioned, contrary to s 5 of the Public Order Act 1936.

*Andrew Rankin QC and D A Phillips* for the appellant prosecutor.

*D B McNeill QC and A J Price* for first five respondents.

*W Waldron* for the last three respondents.

The respondent Aspinall did not appear

**LORD PARKER CJ:** This is an appeal by way of Case Stated from a decision of quarter sessions for the county of Chester which allowed an appeal by the respondents who had been convicted by Bromborough Magistrates' Court of offences against the Public Order Act 1936. In each case the information alleged:

'that they, on Friday, the 1st day of May 1970, at West Kirby Railway Station in the County of Chester, did use threatening behaviour whereby a breach of the peace was likely to be occasioned, contrary to the Public Order Act 1936 section 5.'

The case which would have been put before the court by the prosecution if the matter had proceeded, and I will explain in a moment why it did not, was really this, that on 1st May 1970 at West Kirby railway station a gang of young hooligans who had travelled from Hamilton Square alighted from a train that arrived at West Kirby at 9.30 pm. It seemed clear that after they had alighted from the train they behaved quite disgracefully; some were carrying weapons, most were behaving in a threatening manner; as a result 37 young people appeared before the Wirral Magistrates' Court.

The reason why the evidence was not called when the matter proceeded was that a preliminary point was raised, and the chairman of quarter sessions agreed that that should be dealt with as a preliminary issue. It really was to this effect, whether West Kirby railway station was a public place for the purposes of the Public Order Act 1936. For the purposes of that preliminary issue, it was agreed that the court would proceed on the basis that the respondents were guilty of the conduct alleged, and that it all occurred on the arrival and departure platform of the station. It was in those circumstances and on that preliminary point that the matter proceeded, when in the end quarter sessions held that the station, or in particular the platform concerned, was not a public place for the purposes of the Act, and accordingly dismissed the informations.

The Public Order Act 1936 deals with a number of matters; it dealt in particular with parades in uniform in public places, it dealt with offensive weapons in public places, in processions and public meetings, and by s 5, which was substituted by the Race Relations Act 1965, s 7, and was the section under which this offence was charged, it is provided:

'Any person who in any public place or at any public meeting—(a) uses threatening, abusive or insulting words or behaviour . . . with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.'

Before turning to the definition of 'public place', it is to be observed that that definition had been adopted for other purposes, including the Race Relations Act 1965, and indeed the definition, though not in material respects, has been amended and widened.

The definition section, which is s 9, draws a distinction here between private premises and public places:

' "Private premises" means premises to which the public have access (whether on payment or otherwise) only by permission of the owner, occupier, or lessee of the premises . . . "Public place" means any highway, public park or garden, any sea beach, and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not; and includes any open space to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise.'

Before quarter sessions there was considerable argument and discussion whether this platform was not a footway; that point has been abandoned in this court, but what is urged on the part of the prosecution is that this platform was an open space to which, for the time being, the public have or are permitted to have access whether on payment or otherwise. It can be said to be a very short point and a matter of impression. It was dealt with very shortly by the chairman, and none the worse for that, in his decision. He said:

'I now turn to consider whether it has been established that the platform is an open space to which the public are permitted to have access. Plainly it does not need to be a public open space because the question of payment would not arise if it was a public space. We have to consider whether this was an open space, public or private. Some of the definitions to which we have been referred contemplate that the expression "open space" must refer to a public open space, but this for the purpose of this Act is plainly not the case. "Open space" is used in modern legislation generally to connote an area of land which has not been the subject of development or alternatively an area of land upon which there are no significant structures. Again the court has come to the conclusion that this platform, part of which is covered, as one normally finds at a railway station, cannot fairly and properly be described as an "open space".'

For my part, I agree generally with that, although I would prefer to put it in my own words. Before doing so, I should say that counsel for the appellant in arguing this appeal has, as I understand it, boldly said that any space is an open space within the definition if it is not completely enclosed, if any one side is open to the air or if the roof is open to the air it is an open space for the purposes of this legislation. Accordingly he says, albeit this platform was covered or almost entirely covered but open to the air on one side at any rate, it was therefore an open space.

For my part, it seems to me when one reads this legislation as a whole that the object here for dealing with these several matters is clearly to exclude buildings and what happens in buildings. When one comes to the definition of 'public place' it seems to me quite clear that the opening words are not referring in any sense to buildings. None of the items there specified can in the ordinary sense of the word be referred to as buildings, and accordingly when one comes to the second part 'and includes any open space' it seems to me that that is referring to a place at any rate, however one decides it, which does not constitute a building, or is not an integral part of a building. Approached in that way, as it seems to me, the platform here which formed an integral part of the station, the complex of the station itself, is a building and remains a building notwithstanding that some parts of it are open to the air. In those circumstances it seems to me quite impossible to say that this was an open space.

I would like to add, without deciding it, that the position may be very different when one is considering what ordinarily one would call open spaces and ask oneself the question whether they cease to be open spaces because incidental to their use they happen to be buildings. One immediately thinks of a race course and stands; one thinks of a football ground with stands. It seems to me, as I say without deciding



<b>CUSTOMS AND EXCISE</b> – Being knowingly concerned in fraudulent evasion of restriction – Importation of cannabis – Offence and penalty created by Customs and Excise Act, 1952 – Restriction on importation imposed by Dangerous Drugs Act, 1965 – Proceedings on indictment under Customs and Excise Act, 1952, s 304 – Need of leave of Attorney-General or Director of Public Prosecutions under s 20 of Dangerous Drugs Act, 1965 <b>R v Williams</b> .. .. .	CA	359
<b>EDUCATION</b> – Administrative duty of authority – Allocation of pupils to certain schools – Wishes of parents – Complaint to Minister – Education Act, 1944, s 68, s 76. <b>Cummings v Birkenhead Corporation</b> .. .. .	CA	422
<b>EDUCATION</b> – Teacher – Contract of employment – Refusal to obey order – Right of authority to repudiate contract – Non-observance of regulations regarding dismissal and suspension. <b>Gorse v Durham County Council</b> .. .. .	QBD	389
<b>EXTRADITION</b> – Ireland – Order by magistrate in England – Duty to inquire into merits of charges – Prosecution for political offence if order made – Backing of Warrants (Republic of Ireland) Act, 1965, s 2 (1) (2) (b). <b>Keane v Governor of Brixton Prison</b> .. .. .	HL	240
<b>GAMING</b> – Betting – Office – Advertisement – ‘Premises giving access to a licensed betting office’ – Display of sign on outside wall – Sign showing company’s registered name and containing words ‘turf accountants’ – Indication that premises were licensed betting office – Betting (Licensed Offices) Regulations, 1960, reg 2 – Betting, Gaming and Lotteries Act, 1963, s 10 (5) (a), (b). <b>Maurice Binks (Turf Accountants) Ltd v Huss</b> .. .. .	QBD	148
<b>GAMING</b> – Forecast of future event – Photograph of players taken during football match – Ball not in photograph – Competitors required to mark most likely position of ball – Position later chosen by panel of judges – Success of competitors marking positions closest to that chosen by panel – Betting, Gaming and Lotteries Act, 1963, s 47 (a) (i). <b>Ladbroke (Football) Ltd v Perrett</b> .. .. .	QBD	181
<b>GAMING</b> – Pool betting – Lottery – ‘Competition for prizes for making forecasts as to sporting events’ – Need of skill in making forecasts – Lottery – Betting, Gaming and Lotteries Act, 1964, s 41, Sched 2, para 13 (a). <b>Singette Ltd and Others v Martin</b> .. .. .	HL	157
<b>GAMING</b> – Registration – ‘Club’ – Refusal to register or renew registration – Members’ clubs only included – Registration not applicable to proprietary clubs – Gaming Act, 1968, Sch 7, para 8. <b>Tehrani v Rostrom</b> .. .. .	QBD	350
<b>HIGHWAY</b> – Gipsy – Encamping without lawful authority or excuse – Meaning of ‘encamp’ – Highways Act, 1959, s 127 (c). <b>Smith v Wood</b> .. .. .	QBD	257
<b>HIGHWAY</b> – Obstruction – Stall for sale of goods – Implied licence by local authority. <b>London Borough of Redbridge v Jaques</b> .. .. .	QBD	98
<b>HOUSING</b> – Compulsory purchase – Clearance area – Adjoining land – Need to show purchase necessary for satisfactory development or use of cleared area – “Cleared area” – Housing Act, 1957, s 43 (2). <b>Coleen Properties Ltd v Minister of Housing and Local Government</b> .. .. .	CA	226
<b>HOUSING</b> – Multiple occupation of premises – Requirements to execute works – Notice – Wilful failure to comply – Defence – Bona fide belief that works better performed later – Housing Act, 1961, s 15 (1) (3) – Housing Act, 1964, s 64 (1). <b>Honig v London Borough of Islington</b> .. .. .	QBD	233
<b>HUSBAND AND WIFE</b> – Maintenance of wife – High Court order registered in magistrates’ court – Application for variation – Substantial expenditure of time – Remission to High Court – Maintenance Orders Act, 1958, s 4 (4). <b>Gsell v Gsell</b> .. .. .	PDA	163
<b>HUSBAND AND WIFE</b> – Matrimonial home and other properties bought in husband’s name with wife’s money – Sums transferred by wife to husband at his request – Imposition of trust on husband. <b>Heseltine v Heseltine</b> .. .. .	CA	214
<b>HUSBAND AND WIFE</b> – Matrimonial home – Separation order obtained by wife – Husband tenant of home – Power of court to exclude husband for limited time – Matrimonial Homes Act, 1967, s 1 (2). <b>Tarr v Tarr</b> .. .. .	CA	222
<b>INFANT</b> – Custody – Order of magistrates – Appeal – Further evidence – Discretion of appellate court. <b>Re B (T A) (an infant)</b> .. .. .	Ch D	7



<b>LOCAL AUTHORITY</b> – Statutory powers – Enforcement – Assurance to company of land with access to and use of authority's property – Decision by authority to develop property as housing estate – Right to override company's rights. <b>Dowty Boulton Paul Ltd v Wolverhampton Corporation</b> .. .. .	<b>Ch D</b>	<b>333</b>
<b>LOCAL GOVERNMENT</b> – Merger of council with other councils to form county borough – Loss of employment of clerk and solicitor – Re-settlement and long term compensation – Local Government (Compensation) Regulations, 1963, regs 8, 14 (1) (c) (f). <b>Myrddin-Baker v Teesside County Borough Council</b> .. .. .	<b>QBD</b>	<b>152</b>
<b>MAGISTRATES</b> – Committal to quarter sessions for sentence – Application to change plea of guilty. <b>R v Mutford and Lotheringland Justices. Ex parte Harber. R v East Suffolk Quarter Sessions. Ex parte Harber</b> .. .. .	<b>QBD</b>	<b>107</b>
<b>MAGISTRATES</b> – Irish warrant – Endorsement – No inquiry whether prima facie case made out – Habeas corpus – Likelihood of prosecution or detention for political offence – Backing of Warrants (Republic of Ireland) Act, 1965, s 1 (2) (b). <b>R v Brixton Prison Governor. Ex parte Keane</b> .. .. .	<b>QBD</b>	<b>38</b>
<b>MAGISTRATES</b> – Natural justice – Magistrate acting in administrative or executive capacity – Duty to act openly, impartially and fairly – Seizure of sweet potatoes by local authority officer – Meeting between justice and local government officials before hearing – Box of sweet potatoes shown and sample cut open – Retirement at end of hearing of magistrate with public analyst and chief veterinary officer – Advice received, but not communicated to defendants – Food and Drugs Act, 1955, s 9 (3) – Colouring Matter in Food Regulations, 1966, reg 5 (1). <b>R v Birmingham City Justices. Ex parte Chris Foreign Foods (Wholesalers) Ltd</b>	<b>QBD</b>	<b>73</b>
<b>PUBLIC ORDER</b> – Public place – Using threatening behaviour – Railway station platform – Public Order Act, 1936, ss 5, 9. <b>Cooper v Shield</b> .. .. .	<b>QBD</b>	<b>434</b>
<b>QUARTER SESSIONS</b> – Appeal – Plea – Change of plea – Enquiry whether plea of guilty at magistrate's court equivocal – Right to remit case to magistrate – Quarter sessions entitled to consider only what happened before magistrate – Nothing in proceedings before magistrate casting doubt on plea. <b>R v Marylebone Magistrate. Ex parte Westminster City Council. R v Inner London Quarter Sessions. Ex parte Westminster City Council</b> .. .. .	<b>QBD</b>	<b>239</b>
<b>QUARTER SESSIONS</b> – Committal for sentence – Gravity of offence apparent from nature of charge – Nothing emerging from facts stated by prosecution to increase gravity of offence – Magistrates' Courts Act, 1952, s 29. <b>R v Tower Bridge Magistrate. Ex parte Osman</b> .. .. .	<b>QBD</b>	<b>427</b>
<b>RACE RELATIONS</b> – Housing – Council houses – Tenants restricted to British subjects – Validity – Action for declarations by local authority – Competency – Race Relations Act, 1968, s 2 (1), s 19 (10). <b>London Borough of Ealing v Race Relations Board</b> .. .. .	<b>QBD</b>	<b>131</b>
<b>RATING</b> – Machinery and plant – Generation of power – Electric motors, hydraulic pumps, and air compressors – Motive power derived from electricity supplied to factory – Hydraulic and pneumatic power distributed throughout factory – Rating and Valuation Act, 1925, s 24 (1), Sched 3 (1) (a) – Plant and Machinery (Rating) Order, 1960, Sched. <b>Chesterfield Tube Co Ltd v Thomas (Valuation Officer)</b> .. .. .	<b>CA</b>	<b>1</b>
<b>RENT CONTROL</b> – Contract referred to tribunal – Entry upon consideration of reference – Papers considered by each member of tribunal individually – Assembly and visit to view premises – No admission obtained – Letter of withdrawal – Not operative till received by tribunal – Rent Act, 1968, s 73 (1). <b>R v Tottenham District Rent Tribunal. Ex parte Fryer Bros (Properties) Ltd</b> ..	<b>QBD</b>	<b>94</b>
<b>ROAD TRAFFIC</b> – Articulated vehicle with trailer – Use for unsuitable purpose – Unsuitability for load on route chosen – Motor Vehicles (Construction and Use) Regulations, 1969 (SI 1969, No 321), reg 76 (3). <b>British Road Services Ltd v Owen</b> .. .. .	<b>QBD</b>	<b>399</b>
<b>ROAD TRAFFIC</b> – Driving test – Duty of examiner appointed by Ministry. <b>British School of Motoring Ltd v Simms and Another, Stafford Third Party</b> ..	<b>Assizes</b>	<b>103</b>
<b>ROAD TRAFFIC</b> – Driving while disqualified – Outstanding offences taken into consideration – Similar offence. <b>R v Jones</b> .. .. .	<b>CA</b>	<b>36</b>
<b>ROAD TRAFFIC</b> – Driving with blood alcohol proportion above prescribed limit – Arrest without warrant – Powers of police to detain thereafter – Road Safety Act, 1967, ss 1, 2 (2), 2 (4), 3 (1), 4. <b>R v Mackenzie</b> .. .. .	<b>Assizes</b>	<b>26</b>
<b>ROAD TRAFFIC</b> – Driving with blood alcohol proportion above prescribed limit – Ascertainment of alcohol proportion – 'Ascertainment from laboratory test' – Drink consumed after cessation of driving – Adjustment of test – Road Safety Act, 1967, s 1 (1). <b>Rowlands v Hamilton</b> .. .. .	<b>HL</b>	<b>241</b>

<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion exceeding prescribed limit - Attempting to drive - Car stopped by person wrongly believed by defendant to be police officer - Ignition keys handed over - Departure of defendant from car - Return - Demand for handing back of keys - Refusal - Subsequent breath test - Road Safety Act, 1967, s 1 (1). <b>Harman v Wardrop</b> .. .. .	<b>QBD</b>	<b>255</b>
<b>ROAD TRAFFIC</b> - Driving with blood alcohol proportion above prescribed limit - Provision of specimen - Blood - Analysis by ordinary equipment and skill - Gas chromatography. <b>Smith v Cole</b> .. .. .	<b>QBD</b>	<b>97</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Specimen for laboratory test - Failure to supply - Reasonable excuse - Excuse relating to blood specimen only - Liability to supply specimen of urine - Direction to jury - Road Safety Act, 1967, s 3 (3) (6). <b>R v Harling</b> .. .. .	<b>CA</b>	<b>29</b>
<b>ROAD TRAFFIC</b> - Light signals - Fire brigade vehicles - Passing red lights - Order regulating - Validity. <b>Buckoke v Greater London Council</b> .. .. .	<b>CA</b>	<b>321</b>
<b>STATUTE</b> - Construction - Purposive interpretation - Act providing minimum sentences for specified criminal offences. <b>Kennedy v Spratt</b> .. .. .	<b>HL</b>	<b>203</b>
<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Assessment - Application of Pointe Gourde principle to cases under Land Compensation Act, 1961, s 6 (1), Sched 1, part 1. <b>Wilson v Liverpool City Council</b> .. .. .	<b>CA</b>	<b>168</b>
<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Reference to Lands Tribunal - Agreement between parties as to basis of assessment - Subsequent decision of House of Lords that that basis wrong - Power of court to remit case to tribunal - Discretion. <b>Wilson v Liverpool City Council</b> .. .. .	<b>CA</b>	<b>168</b>
<b>TOWN AND COUNTRY PLANNING</b> - Development - Open land used for market trading - Building erected over whole of site - Ground floor area remaining open - Automatic extinction of former use - New planning unit with nil use created. <b>Petticoat Lane Rentals Ltd v Secretary of State for the Environment</b> .. .. .	<b>QBD</b>	<b>410</b>
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Service - "Occupier" - Licensee - Caravan dweller - Town and Country Planning Act, 1962, s 45 (3) (a). <b>Stevens v London Borough of Bromley</b> .. .. .	<b>ChD</b>	<b>380</b>
<b>TOWN AND COUNTRY PLANNING</b> - Permission - Refusal - Appeal to Minister - Decision in accordance with general policy - Need for genuine consideration of particular matter - Town and Country Planning Act, 1962, s 179 (1) (3) (b). <b>H Lavender and Son Ltd v Minister of Housing and Local Government</b> .. .. .	<b>QBD</b>	<b>186</b>
<b>TOWN AND COUNTRY PLANNING</b> - Permission - Refusal - Authority required to purchase land - Compensation - Assessment. <b>Margate Corporation v Devotwill Investments Ltd</b> .. .. .	<b>HL</b>	<b>19</b>
<b>TRADE DESCRIPTIONS</b> - Defence - Act or default of another person - 'Another person' - Company - Commission of offence through breach of duty of branch manager - Trade Descriptions Act, 1968, s 11 (2), s 24 (1). <b>Tesco Supermarkets Ltd v Natrass</b> .. .. .	<b>HL</b>	<b>289</b>
<b>TRADE DESCRIPTIONS</b> - Defence - 'Mistake' - 'Act or default' - Offence due to conduct of employee - Trade Descriptions Act, 1968, s 24 (1) (a). <b>Birkenhead and District Co-operative Society Ltd v Roberts</b> .. .. .	<b>QBD</b>	<b>194</b>
<b>TRADE DESCRIPTIONS</b> - False description - Milk - Foil cap on bottle accurately describing milk and bearing retailer's name - Names of milk suppliers to whom bottle belonged embossed on bottle - Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1). <b>Donnelly v Rowlands</b> .. .. .	<b>QBD</b>	<b>100</b>
<b>TRADE DESCRIPTIONS</b> - False description - Sale of second-hand car - False number of miles on indicator - Defence - Reliance by defendants on information supplied to them - Act or default of another person - Failure to take all reasonable precautions or exercise all due diligence - Trade Descriptions Act, 1968, s 24 (1) (a), (b), (3). <b>London Borough of Richmond v Motor Sales (Hounslow) Ltd</b> .. .. .	<b>QBD</b>	<b>236</b>



the matter, that in those cases it is perfectly apt to describe the complex as an open space notwithstanding that as incidental to the use of that open space there are buildings. In my judgment, quarter sessions came to a right conclusion and I would dismiss the appeal.

**WIDGERY LJ:** I entirely agree.

**BRIDGE J:** I also agree.

*Appeal dismissed.*

Solicitors: *Robbins, Olivey & Lake*, for *F S Moore & Price*, Birkenhead; *Berkson & Berkson*, Birkenhead; *Percy Hughes & Roberts*, Birkenhead.

T.R.F.B.

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### COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND MEGAW, LJ, LYELL, BRIDGE AND SHAW, JJ)

6th April 1971

R v LOCKER

*Criminal Law—Obtaining pecuniary advantage by deception—Obtaining deferment of debt—Need to prove purpose of defendant to induce creditor to refrain from enforcing payment of debt on due date—Proof that deception was effective—Worthless cheque for rent—Acceptance by landlord—Theft Act, 1968, s 16 (2) (a).*

In order to prove that the defendant has obtained by deception the deferment of an antecedent debt within the meaning of s 16 (2) (a) of the Theft Act 1968, the prosecution must prove (i) that he practised a deception with the intention of inducing the creditor to refrain from requiring payment on the due date; (ii) that the deception was effective in that it caused the creditor to refrain from requiring payment on the date when the debt was originally due.

It is well accepted that where a cheque is passed in the ordinary course of business, the inference is that it is taken by the creditor, not in absolute satisfaction of the debt, but as a conditional payment only, and the same principle applies to a debt for rent as well as to other debts.

The appellant, who was tenant of premises, gave to the landlord a cheque for rent which he knew to be worthless because he desired to have a few days' peace of mind before the cheque was returned and the landlord renewed pressure for payment. The cheque was accepted by the landlord, but later it was returned by the bank marked 'no account'. The appellant was convicted of obtaining a pecuniary advantage by deception, in that he had obtained the deferment of a debt within the meaning of s 16 (2) (a).

**HELD:** though a deception had been practised by the appellant which might well have been practised with the intention of inducing the creditor to refrain from requiring payment on the due date, it did not cause the creditor to accept a deferment of payment, since, when the cheque was received by him, he thought that the debt was being paid; the second essential ingredient of the offence had, therefore, not been proved by the prosecution; and the conviction must be quashed.

**APPEAL** against conviction and sentence at Greater London (Middlesex Area) Quarter Sessions by John Victor Daniel Locker, who was convicted of obtaining money by false pretences, obtaining money by deception, and obtaining a pecuniary advantage by deception. He was sentenced to three years' imprisonment concurrent on each count.

*R J S Harvey QC and D M Fingleton for the appellant.*

*J B R Hagan QC and A D Green for the Crown.*

**WIDGERY LJ** delivered this judgment of the court: The appellant stood his trial on 11th August 1970 at Greater London (Middlesex Area) Quarter Sessions on an indictment containing a number of counts. There were three counts of obtaining money by false pretences, four counts of obtaining money by deception, and further, one count, which was count 8, of obtaining a pecuniary advantage by deception. There was a conviction on each of these counts, and he was sentenced to three years' imprisonment concurrent on each count. He now appeals to this court by leave of the single judge against his conviction on count 8, and his sentence on the indictment as a whole is before the court on a reference by the Secretary of State under s 17 of the Criminal Appeal Act 1968.

I will outline the very brief facts which are relevant to the conviction on count 8. They are these. Towards the end of September 1969 the appellant with a Miss Foster, who was then living with him, took a tenancy of rooms in the house of a Mr Manek. The agreement was that the rent was to be 16 guineas a week, and it was to be paid every four weeks in advance. They went into possession on 4th October 1969; they did not initially pay the month's rent in advance which was then due, but that sum, namely, £65 for the month of October, was in due course paid. On 1st November there became due a further four weeks' rent for the ensuing month, and Mr Manek, the landlord, being dissatisfied with the conduct of the appellant, gave him four weeks' notice to quit, the notice to run from 29th November 1969, and to expire at a date late in December that year. It followed that on and from 29th November 1969 the appellant owed Mr Manek two months' rent, the rent which ought to have been paid in respect of November and the four weeks' rent due on the 29th November for the four weeks in which the notice was running.

On 5th December when an obligation to pay £130 had already accrued in respect of those matters, the appellant gave to Mr Manek a cheque for that sum, £130, drawn on a bank where he had had an account with a modest balance, and where at the relevant time he had no account. The cheque was returned in due course from the bank marked 'no account'. The short, but extremely important, issue of law which is raised in this appeal against conviction is whether on those bare facts it was open to the jury to convict the appellant of an offence under s 16 of the Theft Act 1968, which is in these terms, so far as material:

'(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.

'(2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where—(a) any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred . . .'

The case for the Crown in this matter was that, by giving the cheque which the appellant knew was a worthless cheque to Mr Manek, the appellant dishonestly and by deception caused the payment of that debt to be deferred. The ground is largely new because there is only one other case which has been cited to us in which the terms of s 16 have been considered, and it is an anxious matter for the court, because it is common ground that the events which I have outlined would not have been a criminal offence under the law as it stood before the passing of the 1968 Act. When a new Act produces, or appears to produce, criminal responsibility in new circumstances, it behoves the court to look with particular care at those circumstances. We think that there is no doubt, looking at the Act as a whole, that the intention is to broaden criminal responsibility rather than to restrict it, but that is by no means an answer to the specific problem which faces us now, of the interpretation of a particular section.

In the argument of counsel, for which the court is much indebted, a considerable distinction has been sought to be made between deferring a debt and deferring payment of a debt. There is a trace, or indeed more than a trace, of this distinction in the earlier case to which I have referred, *R v Page* (1), decided in this court on 26th January 1971. Much contention has been raised whether, when applying s 16, we are concerned to see whether the debt has been deferred, or whether all that has happened has been to defer the payment of the debt. This court considers that the distinction drawn between deferment of the debt and deferment of payment of the debt is a misleading and unsatisfactory one. In the context of a debt, the only feature of the transaction which involves time is the time for performance, the time at which the debt is to be paid. We are unable to assist ourselves in the elucidation of this problem by trying to draw distinctions between deferring a debt as opposed to deferring payment. It is, we think, in the end, a question of whether payment has been deferred to which the section is directed, and to which our decision in turn must apply.

Counsel for the appellant has contended that in order to amount to an offence under this section, it is necessary for the prosecution to show that the debtor and creditor have put their heads together; have reached a new enforceable agreement whereby the terms of the original contract of loan have been altered, and whereby the date on which the debt is to be paid has been deferred or postponed. Counsel for the appellant recognises, as he must, that since we are concerned here with a case of deception, any new contract which the parties might have entered into in consequence of that deception is a contract which would on general principles be liable to be set aside in future. He submits, however, that apart from the possibility of the agreement being set aside in that way, it is necessary that the agreement should be a legally enforceable agreement, supported where necessary by consideration, and that it should be an agreement which remodels the original contractual terms between the parties, and thus produces a later date for payment. That, if one may so express it, is the extreme view on one side.

The extreme view on the other side is that it is not necessary to show that there has been a new agreement in the ordinary sense in which one uses that expression in the law of contract, but that it is sufficient if as a consequence of the deception of the defendant the date of payment is in fact deferred. It is argued that that consequence has ensued in the present case on the basis that when the cheque was given by the appellant to Mr Manek and accepted by Mr Manek as a payment of the debt, the result was to suspend the creditor's normal remedies in the courts for the enforcement of the debt until the cheque had either been paid or had been returned from the bank in the ordinary course.

Authority for the proposition that the acceptance by a creditor of a cheque has that general consequence is to be found in the decision of the Court of Appeal in *Bolt & Nut Co (Tipton) Ltd v Rowlands, Nicholls & Co Ltd* (2). I find it unnecessary to deal with the facts of that case, but in the judgment of HARMAN LJ the effects of acceptance of a cheque on the remedies of the creditor are discussed, and he cited with approval a passage from 8 Halsbury's Laws (3rd Edn) p 212, para 362 which reads thus:

\* In the absence of special agreement, a creditor is not bound to accept payment of a debt otherwise than in current coin, or in notes of the Bank of England; and if he takes a bill, note, or cheque in payment, he may either accept it in absolute satisfaction of the debt, in which case he takes the risk of its being dishonoured and can only sue on it, or may accept it as a conditional payment

(1) p 376, ante; [1970] 2 All ER 870.

(2) [1964] 1 All ER 137, [1964] 2 QB 10.



only, the effect of which is to suspend his remedies during the currency of the instrument.'

It is now well accepted that where a cheque is passed in the ordinary course of business, the inference is that it is taken by the creditor not in absolute satisfaction of the debt but in conditional payment only, and accordingly as a general principle what HARMAN LJ said in adoption of the extract from 8 Halsbury's Laws would apply in a case like the present.

Counsel for the appellant has, however, pointed out to us that the consequences are not always the same when a cheque is accepted by a landlord in payment of a debt for rent. He refers to *Belshaw v Bush* (1) where MAULE J, in giving the judgment of the court drew, a distinction between debts for rent and debts of a more general kind. He said:

'If an agreement were expressly made, that the bill should operate as payment, unless defeated by dishonour etc, there is no reason why a suit brought while the payment remained undefeated, should not be barred by such agreement: and the cases in which a bill given on account of the debt has been held to operate as such payment, are to be supported by considering that such an agreement is to be implied by law from giving and receiving such security on account of a debt on simple contract: and the cases in which the giving of the bill has been held not to suspend the remedy on a demand by speciality, or for rent, may be accounted for on the ground that the legal implication of an assent that the bill shall operate as a conditional payment, does not arise, when, if it did, the plaintiff would be deprived of a better remedy than an action on a bill as in *Davis v Gyde* (2), in which, the debt being for rent, the plaintiff would part with a remedy by distress . . .'

I refer to that passage to indicate that we have not overlooked counsel for the appellant's submission on it, but on the conclusion which the court has reached on this matter as a whole the distinction between a debt for rent and a debt of other kinds is not material.

An extreme view, as I have said, in favour of the Crown in this case, and one supported by counsel for the Crown in his argument, is that if the result of the giving of this cheque were to suspend the landlord's remedy for recovery of the debt whilst the cheque was in the process of being presented and returned, this would be a sufficient deferment of the debt to justify the conviction in the court below. As I have said, the facts of this case would not have involved the appellant in criminal responsibility before 1968, and this court does not think that the mere fact that the creditor's remedies at law are suspended in the manner and for a period such as is suggested here, can amount to a deferment of payment of the debt, or deferment of the debt, if it comes to that, within the meaning of the section.

In our judgment, dealing with antecedent debts (and I emphasise that we are dealing only with debts antecedent to the alleged deception) we think that the Crown has got to prove two essentials. In reaching this conclusion, we are influenced by the fact that s 16 is concerned primarily with the advantage obtained by an accused and not with the detriment to the victim. The phraseology of the section makes that perfectly clear, and looking at the section as a whole and confining ourselves to antecedent debts, the two matters in our judgment which the Crown has to prove are these. First, they must show that the accused practised a deception with the intention of inducing the creditor to refrain from

(1) (1851), 11 CB 191.

(2) (1835), 2 Ad & El 623.

requiring payment on the due date. The whole basis of the offence is deception and dishonesty. There must therefore be a deception by the accused, and we think that it must be a deception which is intended to induce the creditor to refrain from enforcing the payment of the debt on its due date. Secondly, it must be shown that the deception was effective, in other words it must be shown that the deception has caused the creditor to refrain from requiring payment on the date when the debt was originally due. If it can be shown that the necessary deception has been practised with the intent to which we have referred, and that in fact and as a matter of cause and effect the creditor has been induced to refrain from requiring payment on the due date, that in our judgment satisfies the requirements of the section in regard to obtaining the deferment of an antecedent debt by deception in the statutory terms.

One must apply that to the present case. In the present case it cannot be doubted that Mr Manek's mental attitude throughout the relevant time was that he wanted to get his debt paid as quickly as possible. It may well be right to say in this case that the appellant did practice a deception; indeed he did by putting forward a worthless cheque as genuine and it may well be right to say that he intended to induce the creditor to refrain from requiring payment on the due date. We say that that may have been his intention because what undoubtedly underlay his action was a desire to have a few days peace of mind before the cheque came back and the pressure was on him again. We see no reason in this case to doubt that the deception was adequately established, and that it may very well have been practised with the intention of inducing the creditor to refrain, at any rate for a short time. When one comes to look to the effect of the deception, however, it is, we think, quite clear that in this case the mind of Mr Manek was never moved to accept a deferment of payment. When the cheque was received by Mr Manek, he thought the debt was being paid; he thought that this was the quickest and obvious way in which his obligation was going to be satisfied. It never, on the evidence, crossed his mind that he was being invited to wait for his money, or that in any sense the actions of the appellant were intended to induce him to wait. We find it impossible to say in this case that as a matter of cause and effect the deception caused Mr Manek, to decide to refrain from pressing for payment. Accordingly it seems to us that the second requirement of the offence is not present, and that in the result this conviction must be quashed.

Before concluding this judgment, however, it is appropriate for us to say a word or two about some of the other matters which have been canvassed, more especially in regard to the other types of debt within the section, namely debts incurred contemporaneously with the deception, and debts which may arise in the future. In particular we have been invited by counsel for the Crown to express an opinion on the correctness of the decision in *R v Page* (1), because we are told that it is a matter of considerable public importance at the present time. In *R v Page* (1), the appellant went to a car hire firm to hire a self-drive car. There was no suggestion that he intended to keep the car permanently, therefore there was no question of his having committed an offence under s 15 of the Theft Act 1968, but he was required as a condition of taking out this self-drive car to pay a sum for the hire and a further sum by way of deposit against accident. He gave two worthless cheques to the car hire company for those two matters, and as a result he was allowed to take the car away. It was contended there at his trial that he had by deception evaded payment of the two debts in question and there was, as I have said, some discussion as to the distinction between deferring or evading a debt and deferring or evading payment to which I have already referred. This court on that occasion came to the conclusion that a

(1) p 376, ante; [1970] 2 All ER 870.

reference to evading a debt in s 16 meant evading payment, and it is perhaps obvious from what I have already said about the views of this court in the present matter that we subscribe to that view also. Insofar, therefore, as there might be any question of the correctness of the decision in *R v Page* (1) on that point, we would confirm it.

However, the conviction of this appellant on count 8 must be quashed for the reasons which I have given, and it is now necessary for us to turn to consider his sentence, referred to us as it is by the Secretary of State. On sentence, we have listened with attention to what counsel for the appellant has to say, but this was a grave case; it was a case of a man battering on two women to a very serious degree, abstracting virtually the whole of their savings in each case, and according to the normal standards of sentence applied in this court three years concurrent on these offences was in no sense too severe. We see nothing special in this case to justify a departure from our normal practice, and come to the conclusion that this appeal, as it now is, against sentence must be dismissed.

*Appeal allowed in part.*

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.

T.R.F.B.

(1) p 376, ante; [1970] 2 All ER 870.

### QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, WIDGERY, LJ, AND BRIDGE, J)

23rd March 1971

R v LEWES JUSTICES. EX PARTE GAMING BOARD OF GREAT BRITAIN

R v LEWES JUSTICES. EX PARTE SECRETARY OF STATE FOR HOME  
DEPARTMENT

*Evidence—Crown privilege—Application to Gaming Board for certificate for consent—Request to board by police on character and reputation of applicant—Letter from police giving information—Alleged criminal libel—Information necessary for proper functioning of board—Overriding public interest for non-disclosure.*

*Certiorari—Witness summons—Issue under s 27 (a) of Magistrates' Courts Act, 1952—Witness required to provide documents for which Crown privilege claimed—Inherent jurisdiction of Divisional Court.*

A company of which R was a director applied under Sch 2 (b) of the Gaming Act, 1968, to the Gaming Board for certificates of consent in relation to five bingo clubs. On 7th July 1969, the board wrote to the Chief Constable of Sussex, asking for information on the character and reputation of R. The Assistant Chief Constable replied to the board in a letter dated 15th September 1969. The certificates were refused. R claimed that he had been sent anonymously a copy of the letter of 15th September, and he instituted proceedings against the Assistant Chief Constable for criminal libel alleged to be contained in the letter of 15th September. On the application of R, witness summonses under s 77 of the Magistrates' Courts Act, 1952, were issued by a justice of the peace, requiring the secretary to the Gaming Board and the Assistant Chief Constable to give evidence and to produce the letters of 7th July and 15th September. The Attorney-General moved the Divisional Court for an order of certiorari to quash the witness summonses, claiming Crown privilege for the two letters and producing a certificate of the Home Secretary, which stated, *inter alia*: 'I consider that if the investigations of the board ... are liable to disclosure, other persons will be unlikely to give to the

board, and the board will not be able to obtain, the full and frank information which, in my view, the board ought to have in order to exercise its statutory functions.'

**HELD:** though the certificate was no longer to be treated by the courts as conclusive, it constituted a valid claim for Crown privilege, which could be claimed for any document regardless of whoever had possession of it and from wherever it had emanated; it was not necessary that the document should have issued from or be in the possession or hands of a Department of State; although a claim for privilege based on 'candour' alone (i.e. on the contention that, unless the claim were upheld, persons responsible for making reports or giving information would not be candid or frank in doing so) now had little validity, in the present case the danger was that the police, who were under no duty to provide information to the board, would not, unless the information were made the subject of absolute privilege, provide the information; and, since it was necessary for the proper functioning of the board that those from whom it required information should provide it, there was in this case an overriding public interest for non-disclosure; and, therefore, an order of certiorari would be made.

On the question of jurisdiction, **HELD** that the court had power to grant the order since (i) (BRIDGE, J., dubitante on this point) the statutory procedure contained in s 2 (2) of the Criminal Procedure (Attendance of Witnesses) Act, 1965, covered only a summons issued under s 2 (1) and did not relate to a witness summons issued under s 77 of the Magistrates' Courts Act, 1952, and so, as no statutory procedure had been laid down for setting aside a witness summons issued under s 77 of the Act of 1952, there was power to quash by an order of certiorari; (ii) in any event it was within the inherent jurisdiction of the Divisional Court to set aside a witness summons if it had been issued in abuse of the process of the court or where it was clear that the witness could not give relevant evidence.

**MOTIONS** by the Gaming Board for Great Britain and by the Home Secretary for an order of certiorari to quash and, in the alternative by the Gaming Board, to set aside two witness summonses issued by a justice of the peace for East Sussex on the application of Henry Rogers whereby Arthur Brian Saunders, secretary to the Gaming Board of Great Britain, and Thomas Christopher Williams, the chief constable of Sussex, were summoned to appear before a magistrates' court at Lewes on the hearing of an information laid by Mr Rogers against Patrick Ross, the assistant chief constable of Sussex, and to give evidence therein and to produce certain correspondence specified in the witness summonses.

*The Attorney-General (Sir Peter Rawlinson QC) and Gordon Slynn for the Home Secretary.*

*J F F Platts-Mills QC, W T Williams QC and D A R Bradley for Mr Rogers.*

*Michael Davies QC and W K Topley for the assistant chief constable.*

*R I Kidwell QC and L F Read for the board.*

**LORD PARKER CJ:** In these proceedings the Attorney-General moves for an order of certiorari to quash witness summonses or in the alternative to set aside those summonses in whole or in part under the inherent jurisdiction of the court. The witness summonses were issued under s 77 of the Magistrates' Courts Act 1952 by a justice of the peace for the petty sessional division of Lewes in connection with proceedings brought by a Mr Henry Rogers against the assistant chief constable of Sussex for criminal libel contrary to s 5 of the Libel Act 1843, that libel being alleged to be contained in a letter dated 15th September 1969 from the assistant chief constable to the Gaming Board. The two witness summonses are first against Arthur Brian Saunders, the secretary to the Gaming Board, requiring him to give evidence and to produce a number of documents, including the letter of 15th September 1969. The second witness summons is directed to Thomas Christopher Williams, the chief constable of Sussex, requiring him to produce a copy of that letter. So far as documents are concerned, it has been agreed that the only two documents required are

first the letter of 15th September 1969, the original of which will be in the possession of the Gaming Board, and the copy with the chief constable, and secondly the original and copy of a letter from the Gaming Board dated 7th July 1969 to which the letter of 15th September was a reply.

The matter arises, quite shortly, in the following way. Some time ago a company called RHD (Eastbourne) Ltd, of which Mr Rogers was a director, applied under the Gaming Act 1968 for certificates of consent in regard to five bingo clubs. In the end, the applications for those certificates were refused, and it was after that had happened that Mr Rogers claims to have received a copy, sent to him anonymously, of the letter of 15th September 1969. He claims that that letter was not only derogatory but false in the information that it gave to the Gaming Board, and in the criminal proceedings he seeks to clear his name.

The Attorney-General claims Crown privilege in regard to those two documents, and for that purpose he puts in a certificate of the Home Secretary claiming privilege. Before referring to that certificate in any detail, it is, I think, convenient to look for a moment at the Gaming Act 1968 in order to see what the functions of the Gaming Board are. By s 10 of that Act, a board known as the Gaming Board was constituted. By s 10 (3) it was provided:

'It shall be the duty of the board to keep under review the extent and character of gaming in Great Britain and, in particular, to keep under review the extent, character and location of gaming facilities which . . . (b) are the subject of applications for the grant or renewal of such licences or such registration, and to perform such other functions as are assigned to the Board by this Act.'

Schedule 2 deals with the applications for grants of certificates of consent which are a condition precedent to applying to the licensing justices for a licence. By Sch 2, para 4, it is provided:

'(5) Subject to sub-paragraph (4) of this paragraph, in determining whether to issue to an applicant a certificate consenting to his applying for the grant of a licence under this Act in respect of any premises, the Board shall have regard only to the question whether, in their opinion, the applicant is likely to be capable of, and diligent in, securing that the provisions of this Act and of any regulations made under it will be complied with, that gaming on those premises will be fairly and properly conducted, and that the premises will be conducted without disorder or disturbance.

'(6) For the purposes of sub-paragraph (5) of this paragraph the Board shall in particular take into consideration the character, reputation and financial standing —(a) of the applicant, and (b) of any person (other than the applicant) by whom, if a licence were granted on the relevant licence application, the club to which the consent application relates would be managed, or for whose benefit, if a licence were so granted, that club would be carried on, but may also take into consideration any other circumstances appearing to them to be relevant in determining whether the applicant is likely to be capable of, and diligent in, securing the matters mentioned in that sub-paragraph.'

It is common knowledge, and indeed this is referred to in the Court of Appeal case of *R v Gaming Board for Great Britain; ex parte Benaim* (1), that the object of Parliament in setting up this legislation was to avoid so far as possible the conduct of gaming clubs getting into the hands of or being associated with the criminal classes, and for that purpose Parliament took the extreme measure of setting up the Gaming Board



with powers enabling them in their discretion to grant or refuse certificates of consent. It is quite clear from Sch 2, para 4, to which I have referred, that it was their duty to make enquiries, among other things, as to the character, reputation and financial standing of, amongst others, Mr Rogers.

It was in those circumstances that the Home Secretary gave a certificate claiming Crown privilege in the present case for the letter to the Sussex Constabulary asking for information and for the reply of the assistant chief constable. By paras 6 and 7 of that certificate the Home Secretary states:

'6. For the purposes of forming an opinion in accordance with paragraph 4 (5) of Schedule 2 to the Act the board are in my view entitled, if not required, to make inquiries into the matters specified in paragraph 4 (6) of the schedule and other circumstances which appear to them to be relevant in determining the matters specified in paragraph 4 (5) thereof, and to discuss and consider the information obtained by the Board as a result of such inquiries.

'7. I understand that the board employs inspectors for the purpose inter alia of making such inquiries, and that in addition to making inquiries of other persons who in the opinion of the board or its officials can furnish relevant information, the board causes inquiries to be made of the police. When the board was set up the Home Office gave approval to such inquiries being made of the police.'

The Home Secretary goes on to say that he has read and carefully considered the two documents in question, and then in para 12 of the certificate he claims the privilege in this form:

'In order to be able to form an opinion as to the matters specified in paragraph 4 (5) of Schedule 2 to the Act and in particular (i) as to whether an applicant is likely to be capable of, and diligent in, securing that the Act and any regulations thereunder are complied with, and (ii) as to the character and reputation of the persons referred to in paragraph 4 (6) of the said schedule, and in order otherwise to be able to fulfil their functions under the Act, it is in my view essential that the board should be able to make inquiries and to receive full, frank and detailed information in confidence and without fear on the part of the board or its officers, or of the person or body giving such information, that such information and the sources thereof will be disclosed subsequently. I consider that if the investigations of the board and information given to the board are liable to disclosure, other persons will be unlikely to give to the board, and the board will not be able to obtain the full and frank information which in my view the board ought to have in order to exercise its statutory functions. In particular it would in my view seriously hamper the work both of the police and of the Gaming Board if information given by the former to the board were liable to production.'

Let me say at once that for my part I am quite satisfied that prior to the recent decision of the House of Lords in *Conway v Rimmer* (1), that certificate of the Home Secretary would have been treated by the courts as really conclusive of the matter. It is said, however, that as a result of that decision, these documents are not the subject of Crown privilege. The first thing that is clear from *Conway v Rimmer*, and I do not propose to read it or passages from it in any detail, is that what was always looked on originally as the sanctity of the certificate of the Minister has gone. Secondly, it is clear that privilege can no longer be claimed alone, as it were, on the grounds so often put forward in these cases that unless privilege is upheld, no one

(1) [1968] 1 All ER 874; [1968] AC 910.



will give a frank, honest and full reply to a question, or make a frank report. Such cases have conveniently from time to time been referred to as 'candour' cases. Unless privilege is claimed, it is said that those responsible for making reports, minutes and giving information will not be candid and frank in their replies.

Further, in *Conway v Rimmer* it was decided that in each case it was necessary to balance rival public interests, the public interest that might result from disclosure and the public interest involved in denying a litigant material evidence, whether in civil or criminal proceedings. In the present case this evidence consists of the very document on which his case is based.

Counsel for Mr Rogers in the light of *Conway v Rimmer* has taken really what are I think three separate points. He says in the first instance that Crown privilege does not arise unless the document in question has emanated from a Department of State, or is in the possession of, or in the hands of a Department of State. I confess that I have never thought of Crown privilege as limited in that respect, albeit those may be the most usual cases where it arises. Indeed when one reads *Conway v Rimmer* it seems to me perfectly clear that Crown privilege can be claimed for a document whosoever has possession of it and from wherever it has emanated. It is sufficient, perhaps, in this connection to refer to the speech of LORD REID where he said:

'These cases open up a new field which must be kept in view when considering whether a Minister's certificate is to be regarded as conclusive. I do not doubt that it is proper to prevent the use of any document, wherever it comes from, if disclosure of its contents would really injure the national interest, and I do not doubt that it is proper to prevent any witness, whoever he may be, from disclosing facts which in the national interest ought not to be disclosed.'

The second point taken is that this claim for privilege is really within the 'candour' class of case. It is suggested that the claim is really this, that unless the police are protected, they will not give honest and frank information. It is true that their Lordships in all the speeches in the House of Lords thought little of the claim for privilege based on this type of case, the 'candour' case. The Attorney-General, in answer to one of my Lords in the course of argument, said that the claim for privilege, to put it generally, on the ground of candour or lack of candour had gone. I am by no means prepared to go to that length, although I think that it is clear from all the speeches of their Lordships that an argument based on candour alone had very little validity.

This, however, as it seems to me is not such a case. The typical cases in regard to candour are cases where somebody, maybe a civil servant, or even a Minister, is under a duty to give some information or to write a report, and in such cases it was said by their Lordships that it is difficult to think that anybody whose duty it is to make a fair and honest report will not do so even though no claim for absolute privilege is made. This, however, as I see it is not such a case. The danger here if privilege is not claimed, is not that the answer will be the less frank or honest, but the danger is that there will be no answer at all. As it seems to me, unless they had some protection the police would be fully entitled to say: 'It is no part of our duty to give information to the Gaming Board. We are not going to give any information at all.' They have acted as informants to the Gaming Board at the request or with the approval of the Home Office and, as it seems to me, the police are entitled to say: 'Yes, we will do that; we will give full and frank information, provided you, the Home Office, see that we are protected.' That seems to me quite a different sort of case. Here, when one analyses the position, one sees that one of the duties which the Gaming Board have to perform is to prevent gaming clubs getting into unsatisfactory hands. It is their duty to collect information wherever they can,

including the police, and unless some protection is given to those who supply information, no one will supply any information. It is one thing to say that they can claim qualified privilege in libel proceedings; it is quite another thing to say that they will have to run the risk of being sued or prosecuted for libel albeit without success.

It is then said by counsel for Mr Rogers that, as was said in *Conway v Rimmer* (1), one must in any event balance the two public interests involved. He says here what is undoubtedly true, that this claim for criminal libel fails unless the document of 15th September 1969 is produced. In my judgment, however, once one finds, as I do find, that it is really necessary for the proper functioning of the Gaming Board that those of whom it requires information should give information, and give information which is frank and candid, then as it seems to me there can be only one answer to the question, namely that the overriding public interest is for non-disclosure.

Finally counsel for Mr Rogers takes the point that in any event the procedure in this court is wrong. As I understand it, his argument is based on the Criminal Procedure (Attendance of Witnesses) Act 1965. By s 8 of that Act subpoenas in respect of any proceeding for the purpose of which a witness summons may be issued under s 2 of that Act or in respect of any proceedings for the purpose of which a summons may be issued under s 77 of the Magistrates' Courts Act 1952 were abolished. In other words, from the coming into force of the Criminal Procedure (Attendance of Witnesses) Act 1965, subpoenas in a limited class of case were abolished, and amongst the type of proceedings in which subpoenas were abolished were witness summons issued in magistrates' courts. When one turns to s 2 of the 1965 Act, it is provided :

'(1) For the purpose of any criminal proceedings before a court of assize or quarter sessions a witness summons, that is to say, a summons requiring the person to whom it is directed to attend before the court and give evidence or produce any document or thing specified in the summons, may be issued out of that court or out of the High Court. [Note that 'witness summons' is there defined and that it is only for the purpose of any criminal proceedings before a court of assize or court of quarter sessions.]

'(2) [which provides for the procedure for setting aside such a witness summons] If any person in respect of whom a witness summons has been issued applies to the court out of which the summons was issued or to the High Court, and satisfies the court that he cannot give any material evidence or, as the case may be, produce any document or thing likely to be material evidence, the court may direct that the summons shall be of no effect.'

Notwithstanding that sub-s (2) follows sub-s (1) in the same section, counsel for Mr Rogers boldly argues that sub-s (2) covers a witness summons issued under s 77 of the Magistrates' Courts Act 1952. I am quite unable to accept that argument. It seems to me abundantly clear that the witness summons the setting aside of which is dealt with in sub-s (2) is the witness summons issued under sub-s (1), i.e. for the purpose of any criminal proceedings before a court of assize or quarter sessions. If counsel for Mr Rogers were right, then this procedure would be wrong in that the proper course would be to apply to the magistrates' court itself to set aside the witness summons or to apply to the High Court, which in this case would be to a master in chambers. However, I am quite unable to accept the argument that this is a case covered by s 2 (2) of the Act of 1965.

As it seems to me, Parliament has not laid down any statutory method by which a witness summons issued under s 77 of the Act of 1952 can be set aside. In *R v Hove Justices, ex parte Donne* (2), this court did set aside such witness summonses by means

(1) [1968] 1 All ER 874; [1968] AC 910.

(2) 131 JP 460; [1967] 2 All ER 1253.

of an order of certiorari to quash. The matter was never argued there at all, and the court dealt with the matter in what appeared the most expeditious way of setting aside the witness summonses. For my part, I am prepared to accept that this could be done by way of certiorari, and for this reason, that before the justice of the peace has jurisdiction to issue a witness summons he must be satisfied, as the witness summons itself states, that in the case of documents the proposed witness is likely to be able to produce documents likely to be material evidence. On an *ex parte* application he so finds and issues a witness summons.

If, as this court now holds, Crown privilege is applicable, then it turns out that the magistrate is wrong and that the witness concerned is not able to produce a document which is likely to be material evidence, in other words, the magistrate has given himself jurisdiction to issue the witness summons by what turns out to be a wrong finding of fact. In those circumstances it does seem to me that there are grounds for saying that the matter can be dealt with by an order of certiorari to set aside the witness summonses altogether.

Having said that, however, I am quite satisfied that in any event it is within the inherent jurisdiction of this court, just as it was before subpoenas were abolished, to set aside a witness summons if there has been an abuse of the process of the court or if it is clear in fact that the witness cannot give relevant evidence. In these circumstances while I conceive that an application could be made to a magistrates' court itself to set aside the witness summons, it is also possible for this court, and often that is the most convenient course, to set it aside itself. Accordingly, I have come to the conclusion here that these two witness summonses should be set aside insofar as they require the production of these two documents.

**WIDGERY LJ:** I entirely agree with the judgment which has just been delivered. As LORD PARKER CJ has pointed out, the sanctity of the Minister's certificate, which used so often to prevail in these cases before 1968, has gone by reason of the decision of the House of Lords in *Conway v Rimmer* (1), and that which has taken its place can, I think, conveniently be expressed in the words of LORD REID. In his speech at that point LORD REID said:

'I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh then the Minister's view must prevail; but experience has shown that reasons given for withholding whole classes of documents are often not of that character. For example a court is perfectly well able to assess the likelihood that, if the writer of a certain class of document knew that there was a chance that his report might be produced in legal proceedings, he would make a less full and candid report than he would otherwise have done.'

Approaching the matter in that light, one finds that most claims for privilege tend to fall into one of two groups. The first are claims based on the actual contents of the documents, it being said by the Crown's representative that the document discloses facts which, if made public, will be injurious to the public interest. The second group of cases are those where it is said that the character of the document is such that, if privilege is not afforded in respect of it, the production of documents of a

(1) [1968] 1 All ER 874; [1968] AC 910.

similar character or class in future may be inhibited to the prejudice of the public service.

The present case does not come into the first group; it is not suggested that the actual information disclosed in the letters in question would be damaging to the public interest if the public bore that knowledge. What is said in this case is that the matter falls into the second group in that the type of report which was made by the police in this case is a type of report which the future functioning of the Gaming Board will require to be produced from time to time, and it is said that if privilege is not granted in respect of these letters the result in future will be, not to put it too strongly, to dry up a vital source of supply of information to the Gaming Board. In principle the objection is not unlike that which has been raised from the earliest times when a police officer is asked to disclose the sources of his information. It is well recognised that the disclosure of such sources will dry up the source, and although the two cases are not by any means identical, they have, in my judgment, a great deal of common ground.

So far as this particular case and these particular documents are concerned, the Secretary of State has certified that in his opinion it would be injurious to the public interest to produce these documents, and it is necessary to withhold them from production for the proper functioning of the public service. He has chosen there the precise phrase recommended by LORD REID in *Conway v Rimmer* (1) as being the determining factor to which the court should look in deciding whether, in cases of the second group, the possible injury to the public through the publication, outweighs the undoubted injury to the public through a restriction in the operation of the course of justice. The Minister here has certified that in this case that test is satisfied. He does so with an intimate knowledge of the requirements of the Gaming Board and of the functioning of the police forces. Although we are not bound to accept the same view, his opinion expressed in that way and expressed in these circumstances is one which, in my judgment, carries great weight, and not only that; I personally am impressed by the opinion which he has expressed, and I think that it is right. I think that it is quite proper to say in the context of this case that if one once permitted general publication of information of this kind, those who supply the information would be minded to supply it no more. LORD PARKER CJ has pointed out that the police are not bound to supply references for people on request. They are not bound, as I understand it, to supply the Gaming Board with the vital information which at present they supply. The effect of denying the Crown's privilege in this case might be in the Minister's view to dry up that sort of information, and I think this is a perfectly proper approach to the question; it is one with which I agree, and accordingly I also am of opinion that the claim of privilege is valid.

Counsel for Mr Rogers has made much of the point, and properly made much of the point, that this case is not unlike earlier cases where it was said that a failure to award privilege would result in a lack of candour in future reports of the same kind. I think that it is an over-simplification to say that *Conway v Rimmer* (2) has disposed of the so-called candour cases. What *Conway v Rimmer*, in my judgement, has disclosed is that before that decision there were many cases in practice where privilege was successfully claimed on no better or other ground than the so-called lack of candour ground. What the learned Law Lords in *Conway v Rimmer* are pointing out is that in a great many cases there is really no substance in the 'lack of candour' argument. They are pointing out for the future that in many instances of public servants who are under a duty to supply information, those servants are not in fact likely to be affected in their candour by the prospect or lack of prospect of publication. *Conway v Rimmer* is a warning to us for the future not lightly to accept the 'lack of candour'

(1) [1968] 1 All ER 874; [1968] AC 910.

argument, because in many instances it will on investigation be found to be insufficient to tip the balance in favour of the Crown's claim for privilege. That claims based on lack of candour can in theory still arise I do not doubt, but I suspect they will be rare in practice.

In my judgment, the real answer to the present case is that, as LORD PARKER CJ has said, this is not simply a lack of candour claim; it is a danger, according to the Minister, of the supply of information drying up. That is quite a different matter, and, in my opinion, fully justifies the claim being made. I too would allow certiorari to go.

**BRIDGE J:** On the substance of the matter I agree with both judgments which have been delivered. It is said in an attack on the basis of the Secretary of State's claim for privilege that its rationale has been undermined in advance by the reasoning of their Lordships in *Conway v Rimmer* (1). In the light of that attack, I am comforted to discover, as it seems to me, that that very rationale is foreshadowed in a passage from the judgment of LORD DENNING MR, not a noted enthusiast for the doctrine of Crown privilege as it was understood before *Conway v Rimmer*, in *R v Gaming Board for Great Britain, ex parte Benaim* (2) which was referred to by LORD PARKER CJ. LORD DENNING said apropos the Gaming Board:

'Seeing the evils that have led to this legislation, the board can, and should, investigate the credentials of those who make application to them. They can, and should, receive information from the police in this country or abroad, who know something of them. They can, and should, receive information from any other reliable source. Much of it will be confidential. But that does not mean that the applicants are not to be given a chance of answering it. They must be given the chance, subject to this qualification: I do not think that they need tell the applicants the source of their information, if that would put their informant in peril or otherwise be contrary to the public interest. [After a reference to the authorities which established the proposition that the identity of police informers is never to be disclosed, LORD DENNING MR continued:] That reasoning applies with equal force to the enquiries made by the board. That board was set up by Parliament to cope with disreputable gaming clubs and to bring them under control. By bitter experience it was learned that these clubs had a close connection with organised crime, often violent crime, with protection rackets and with strong-arm methods. If the board were bound to disclose their sources of information no one would "tell" on those clubs, for fear of reprisals. Likewise with the details of the information. If the board were bound to disclose every detail, that might itself give the informer away and put him in peril.'

On the procedural point as to the jurisdiction of this court to grant the relief sought by the Attorney-General, for my part I entertain some doubt whether it can properly be said in the circumstances that certiorari lies on the ground that the justices who issued the summons under s 77 of the Magistrates' Courts Act 1952 had no jurisdiction, and I prefer not to decide the matter on that ground. But I entertain no doubt that the old inherent jurisdiction of this court to control criminal proceedings in inferior courts, which extended to setting aside subpoenas issued for the purpose of criminal proceedings in magistrates' courts on the ground inter alia, that they were an abuse of the process of the court, or on similar grounds, survives s 77 of the Magistrates' Courts Act 1952 which, as LORD PARKER CJ has pointed out, provides no

(1) [1968] 1 All ER 874; [1968] AC 910.

(2) [1970] 2 All ER 528, [1970] 2 QB 417.



alternative statutory remedy in this situation, and it is a proper exercise of that inherent jurisdiction to set aside the summons in this case.

*Order for certiorari.*

Solicitors: *Treasury Solicitor; Gates & Co, Brighton; T Lavelle, Lewes; Gregory, Rowcliffe & Co.*

T.R.F.B.

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### QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, WIDGERY, LJ, AND BEAN, J)

29th March 1971

FORD v FALCONE

*Criminal Law—Vagrancy—Indecent exposure with intent to insult female—Exposure in private room—Vagrancy Act, 1824, s 4, as amended by Criminal Justice Act, 1925, s 42.*

In view of the amendment made to s 4 of the Vagrancy Act, 1824, by s 42 of the Criminal Justice Act, 1925, which repealed the words in s 4 'in any street, road or public highway, in the view thereof, or in any place of public resort', the commission of the offence of wilfully, openly, lewdly and obscenely exposing the person with intent to insult a female is no longer limited to exposure in a public place. Exposure in a private place, such as a room in a house, will now constitute an offence under s 4.

CASE STATED by a metropolitan magistrate.

On 14th September 1970 an information was preferred by the appellant, David Ford, a constable of the Metropolitan Police, against the respondent, Pasqualino Falcone, charging that he on 12th September 1970 at 169 Old Brompton Road, London SW5 wilfully, lewdly, openly and obscenely exposed his person with intent to insult a female contrary to s 4 of the Vagrancy Act 1824, as amended by s 42 of the Criminal Justice Act 1925.

At the hearing of the information at Marlborough Street Magistrates Court on 24th September and 7th October 1970, evidence was given by and on behalf of the appellant to the following effect. Shortly before noon on 12th September 1970 Mrs June Walker went to room 18, which was occupied by the respondent at 169 Old Brompton Road, for the purpose of collecting rent from the respondent. Mrs Walker knocked on the door of room 18 and was invited by the respondent to enter. On entering the room Mrs Walker picked up the rent book, but observed that there was no money therein. The respondent was in bed, but had no clothing on the upper part of his body, so Mrs Walker turned to leave. As she did so, the respondent called out 'Here you are', and Mrs Walker turned back towards the respondent, thinking that he was going to give her the rent. Mrs Walker saw that the respondent was then out of bed and that his underpants were pulled down below his thighs. The respondent was holding his exposed penis in both of his hands and making movements with his hands. The respondent said to Mrs Walker 'Here you are—come here, I'll show you what I do to the young girls'. Mrs Walker left the room and shouted for another of the tenants. The appellant was then called to the room and saw that the respondent was wearing only his underpants. Mrs Walker complained to the appellant in the presence of the respondent of the respondent's behaviour, whereupon the appellant cautioned the respondent who said: 'It's a mistake, I must have been scratching myself.'



At the conclusion of the evidence called by and on behalf of the appellant the magistrate adjourned the hearing of the information to 7th October 1970 so that both parties could be legally represented. At the adjourned hearing of the information on 7th October 1970 it was contended on behalf of the respondent that there was no case for him to answer in law because the word 'openly' in s 4 of the Vagrancy Act 1824 meant in a place of public resort, whereas the acts complained of occurred within the privacy of the respondent's room.

It was contended on behalf of the appellant that the word 'openly' in the context of s 4 of the Vagrancy Act 1824 meant 'without concealment'; that in other parts of the Act the words 'public place' were specifically referred to; and that the offence created by the Act should be contrasted with the common law offence of public nuisance in that it was intended to apply to both public and private places, and that accordingly the appellant had *prima facie* proved the offence disclosed by the information.

The magistrate was of the opinion that the Vagrancy Act 1824 was aimed at preventing misbehaviour by or towards persons in the streets; that an act in a private room was not within the scope of the Act, and that on a proper construction of s 4 of the Act the word 'openly' referred to acts occurring in a public place. He accordingly dismissed the information, without calling on the respondent to answer the case against him. The appellant appealed.

*D H Farquharson* for the appellant.

The respondent did not appear and was not represented.

**BEAN J:** This is an appeal by way of Case Stated from a decision of Sir John Aubrey-Fletcher, one of the metropolitan stipendiary magistrates, and it raises a short and interesting point under the Vagrancy Act 1824. An information had been laid against the respondent in respect of an incident that took place on 12th September 1970 at 169 Old Brompton Road in London when he was alleged wilfully, openly, lewdly and obscenely to have exposed his person with intent to insult a female contrary to s 4 of the Vagrancy Act 1824.

The short facts of that incident were that his landlady apparently had gone to his room with a view to collecting his rent, and while she was in the room he exposed his person to her quite deliberately, and added a few offensive words in addition. The learned stipendiary magistrate hearing the facts adjourned the matter for both parties to be legally represented, and, having heard legal argument, then expressed the opinion that the 1824 Act

'was aimed at preventing misbehaviour by or toward persons in the streets; that an act in a private room was not within the scope of the said Vagrancy Act, and that upon a proper construction of the said section 4 of the said Vagrancy Act the word "openly" referred to acts occurring in a public place.'

The relevant part of s 4 as originally enacted read thus:

'every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female.'

committed an offence. Had the wording remained like that there is no doubt that this court would have supported the ruling of the learned stipendiary magistrate. But under the Criminal Justice Act 1925, s 42, the words 'in any street, road, or public highway, or in the view thereof, or in any place of public resort' were repealed so that the relevant part of s 4 now reads that it is an offence for a person 'wilfully, openly, lewdly, and obscenely [to expose] his person with intent to insult any female'.

Having regard to the deliberate nature of the amendment, it would seem that what happened in this case does *prima facie* fall fairly and squarely within the amended words of s 4 of the Vagrancy Act 1824, and, accordingly, in my judgment, this appeal ought to be allowed, and this matter ought to be referred back to the stipendiary magistrate to hear the case and then make his decision.

**WIDGERY LJ:** I agree.

**LORD PARKER CJ:** I also agree.

Solicitor: Solicitor, Metropolitan Police.

*Case remitted.*

T.R.F.B.

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**QUEEN'S BENCH DIVISION**

(PHILLIMORE AND STEPHENSON, LJJ, AND WALLER, J)

6th, 7th May 1971

R v KNIGHTLEY

*Road Traffic—Driving with blood-alcohol proportion exceeding prescribed limit—Specimen for laboratory test—Hospital patient—Notification to medical practitioner of proposal to make 'requirement'—Failure to include in notification statutory warning of possible consequences of refusal—Road Safety Act, 1967, s 3 (2), (3), (10).*

By s 3 (2) of the Road Safety Act, 1967: 'A person while at a hospital as a patient may be required by a constable to provide at the hospital a specimen for a laboratory test . . . but a person shall not be required to provide a specimen for laboratory test under this subsection if the medical practitioner in immediate charge of the case is not first notified of the proposal to make the requirement or objects to the provision of a specimen on the ground that its provision, the requirement to provide it, or warning under sub-s (10) of this section would be prejudicial to the proper care or treatment of the patient.'

In order to comply with the provisions of the aforementioned subsection, the medical practitioner must be notified not only that the patient will be required to provide the specimen, but also that the patient will receive at the time of the requirement the statutory warning under s 3 (10) that failure to provide the specimen may render him liable to penalties. Where there has been an omission to notify the medical practitioner of the proposal to give the statutory warning, the omission cannot be cured by a subsequent warning given to the patient in the presence of the medical practitioner.

*Road Traffic—Failure to supply specimen—Reasonable excuse—Concession—Direction to jury on effect of concession—Road Safety Act, 1967, s 3.*

On a charge under s 3 (3) of the Act of failing to provide a specimen for a laboratory test without reasonable excuse, where there is evidence that the defendant had suffered from concussion the jury should be directed to consider whether the concussion confused his mind to the extent of affording him a reasonable excuse for refusing to supply the specimen.

APPEAL by Alan James Knightly, who was convicted at Hertfordshire Quarter Sessions of failing to supply a specimen for a laboratory test, contrary to the Road Safety Act 1967, s 3 (3), and was sentenced to four months' imprisonment and disqualified from driving for 12 months.

C P B Purchas for the appellant.

J P D Wadsworth for the Crown.

**STEPHENSON LJ** delivered the following judgment of the court: On 30th March 1971 the appellant was convicted at Hertfordshire Quarter Sessions of failing to supply a specimen contrary to s 3 (3) of the Road Safety Act 1967. The particulars of the offence were that on 6th September 1970 in the county of Hertfordshire, while a patient at Lister Hospital, Hitchin, without reasonable excuse, he failed to provide a specimen for a laboratory test when required to do so by a constable. He was then subject to a sentence of three months' imprisonment, suspended for two years by Luton Magistrates' Court on 29th April 1970, for dishonestly handling a stolen motor car. He was accordingly sentenced to four months' imprisonment for his 1971 offence, and his suspended sentence was put into effect concurrently. He was disqualified from driving for 12 months. He applies to this court for leave to appeal against conviction and sentence.

Counsel for the appellant has put forward two grounds in support of his application for leave to appeal against conviction which this court thinks ought to succeed. We need not, therefore, trouble about other grounds; we shall treat these applications as appeals and we shall quash the conviction and sentence for reasons which will appear from this judgment.

On the night of 5th September 1970 the appellant drove his motor car into collision with another vehicle at a road junction at Letchworth and was then taken to Lister Hospital at about 12.50 am on 6th September where he was in the charge of a Mr Ralte, and was visited by two police officers. In the appellant's presence one police officer said to Mr Ralte: 'I wish to ask [the appellant] for a specimen of breath. Have you any objection?' The doctor said: 'If he is able to discharge himself he must be fit'. The police officer then said to the appellant: 'I have reason to believe you were the driver of a Mini car which was involved in an accident at Letchworth to-night'. He said: 'Yes, that is right', and he gave the completely true and proper answer of the number of the car: '8641 KF'. The police officer said: 'I require you to take a breath test. Do you consent?' He replied: 'No, I don't think I am fit enough'. The police officer said to Mr Ralte: 'I wish you to ask him to supply a sample of blood or urine', and the doctor said: 'He is fit enough to give one'. The police officer then said to the appellant in Mr Ralte's presence:

'I require you to give a specimen for the purpose of a laboratory test. You will be supplied with part of that specimen. Failure to provide the specimen of blood or urine may make you liable to imprisonment, a fine and disqualification.'

The appellant said: 'Yes', and the police officer then said: 'Which will it be?' to be told by the appellant, 'Blood'. After the police surgeon arrived, about 40 minutes later, the appellant changed his tune and refused to give a specimen of his blood unless his solicitor was present. 'I want him to argue', said the appellant, 'whether I am fit enough to give a sample'. He maintained that refusal and was, therefore, prosecuted for an offence against s 3 (3).

Mr Ralte was an orthopaedic surgeon, a fellow of the Royal College of Surgeons, with over ten years' experience of casualty work. On examining the appellant he admitted that he could find nothing wrong with him except a cut above his left eye. X-rays disclosed no fracture. The doctor appears to have had some difficulty in expressing himself clearly in the English language, and to have expressed differing views on whether the appellant was drunk and how sensible and relevant his conversation was. But he agreed that many symptoms of concussion and drunkenness were similar. The appellant had made a written statement on 15th September in which he informed the police that he could remember nothing between 11.50 pm on 5th September and 3.00 am on 6th September. That he repeated in his evidence to the jury. The other evidence called by counsel for the appellant was that of a neuro-surgeon, Mr Gleave, who had read the notes of Mr Ralte's evidence and

examined the appellant on the morning of the day on which he gave evidence. He was of the opinion that the appellant's condition in hospital was consistent with diagnosis of post-traumatic amnesic phase following cerebral concussion. It was conceded by the Crown that there was some concussion, and the issue for the jury was whether it had produced a condition which constituted a reasonable excuse for the appellant's failure to provide a specimen of his blood or urine.

Counsel for the appellant's first point related to that same issue, but we will deal with his second point first. It is this, that the learned deputy chairman should have upheld his submission made on behalf of the appellant that, on a proper construction and interpretation of s 3 (2) of the Road Safety Act 1967, it was necessary for the medical practitioner in immediate charge of the case to be notified of his intention to give warning under s 3 (10) of the Act. Section 3 provides:

'(2) A person while at a hospital as a patient may be required by a constable to provide at the hospital a specimen for a laboratory test—(a) if it appears to a constable in consequence of a breath test carried out on that person under section 2 (2) of this Act that the device by means of which the test is carried out indicates that the proportion of alcohol in his blood exceeds the prescribed limit; or (b) if that person has been required, whether at the hospital or elsewhere, to provide a specimen of breath for a breath test, but fails to do so and a constable has reasonable cause to suspect him of having alcohol in his body; but a person shall not be required to provide a specimen for laboratory test under this subsection if the medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of a specimen on the ground that its provision, the requirement to provide it or a warning under subsection (10) of this section would be prejudicial to the proper care or treatment of the patient . . . (10) A constable shall on requiring any person under this section to provide a specimen for a laboratory test warn him that failure to provide a specimen of blood or urine may make him liable to imprisonment, a fine and disqualification, and, if the constable fails to do so, the court before which that person is charged with an offence under section 1 of this Act or this section may direct an acquittal or dismiss the charge, as the case may require.'

Mr Ralte was admittedly the medical practitioner in immediate charge of the appellant's case when the appellant was a patient in the hospital. He was admittedly told by the police of their intention to require a breath sample under s 2 (2) (b) and a blood or urine sample under s 3 (2) (b). He raised no objection, but he was not told of their intention to warn the appellant of the consequences of failing to provide a specimen in accordance with s 3 (10).

When the Act forbids requiring a patient at a hospital to provide a specimen unless his medical practitioner is first notified of 'the proposal to make the requirement', does the Act forbid it unless he is first notified of the proposal to give him the statutory warning which must accompany the requirement? Counsel for the appellant submits 'Yes'. Counsel for the Crown says 'No'. The true answer is, in our opinion, to be found in the following considerations. Parliament was concerned to provide for the case of a person suspected of driving after consuming too much alcohol but admitted to hospital for medical care or treatment. The Act recognises in s 3 (2) that to provide a specimen of blood or urine—and in s 2 (2) a specimen of breath—or even to require it to be provided, or to warn the patient that failure to provide a specimen of blood or urine may have penal consequences, may be prejudicial to the proper care and treatment of him. It also recognises that the medical practitioner in immediate charge of his case should decide whether any of these three things would be prejudicial to his patient. The medical practitioner has, therefore, to be

given an opportunity of objecting to any of these three things. Each might be prejudicial; for instance, the provision of a specimen of urine to a man with pelvic injuries (*R v Green* (1)), or the warning that he might be sent to prison to a patient with a weak heart. So the medical practitioner has to be notified in advance of the proposal to make the requirement before it is made. If this requirement is to be made it must be accompanied by the statutory warning. How is the medical practitioner to know that so that he may decide whether that warning may be prejudicial to his patient's care or treatment and, therefore, objectionable? Counsel for the Crown says that he is presumed to know the law and Parliament and the courts impute knowledge of s 3 (10) to him.

We prefer the view that the wide variety to be expected in the patients admitted to hospital after road accidents in which alcohol is suspected to have played a part, and in the professional experience of casualty officers who take charge of such patients, makes such a presumption an inadequate protection for suspect patients against possible injury from police action under 'this rather intricate enactment'. Those words are taken from LORD PEARSON's dissenting speech in *Rowlands v Hamilton* (2). We do not want to add to the difficulties of the police in enforcing these provisions of the Road Safety Act 1967, but we think that the words, 'the proposal to make the requirement' in their natural meaning signify the proposal to make the requirement in accordance with the Act, i.e. the requirement to provide a specimen for a laboratory test accompanied by the statutory warning, and that the medical practitioner is entitled to be notified of what the proposal involves so that he may consider whether to object to the provision, the requirement, or the warning.

If that is right, failure to notify the medical practitioner of the proposal to warn before the patient is required to give a specimen offends against the Act and cannot be cured, as counsel for the Crown rightly concedes, by warning the patient in the presence of the medical practitioner, as the deputy chairman appears to have thought in this case. Such a view, if it was his view, ignores the words 'first notified'. If the appellant had suffered from heart trouble and had had a heart attack on being warned, the Crown could not have said that the Act had been complied with because Mr Ralte heard the warning given. It is not disputed that the result of the failure to notify Mr Ralte in advance of the proposal to make the requirement in the full sense of these words is that (as in *R v Green* (1)) the requirement to provide a specimen was not in accordance with the Act and the refusal to provide it was not an offence.

The appellant is fortunate, because it is clear from Mr Ralte's evidence that the provision of the laboratory specimen could not have been prejudicial to the appellant's care and treatment and there is no reason to suppose that the statutory warning would have been prejudicial in that Mr Ralte would have objected to its being given. But that does not dispose of counsel for the appellant's point—and it is a point of general importance—or make what was said by the police officer to Mr Ralte or in his hearing a notification which complies with s 3 (2) of the Act.

We accede to the submission of counsel for the appellant that his submission to the deputy chairman should have been upheld and quash the conviction. If the proper procedure had been carried out we should, nevertheless, have felt bound to quash this conviction on the other ground submitted on behalf of the appellant, namely:

'that the learned deputy chairman failed to put before the jury the question of concussion and failed to direct the jury whether a state of concussion could amount to a reasonable excuse for failing to provide a specimen for a laboratory test.'

(1) 134 JP 208; [1970] 1 All ER 408.

(2) p. 241 ante; [1971] 1 All ER 1089.



After telling the jury that there was really only one fact in issue and that he would explain this later, the deputy chairman told the jury that what the case was all about was really quite a short matter, the words 'without reasonable excuse'. Then after reminding the jury of the appellant's evidence, he ended his summing-up in this way:

'Now you have heard Mr Gleave give you his opinion about this. You have heard a lot about post-traumatic amnesia and retrograde amnesia and automatism. You have heard what the doctor says about the possibility, even, it may be, the probability, of some concussion. Remember this, members of the jury, and let's use our common sense, remember this: that Mr Gleave saw [the appellant] apparently for the first and only time this morning, more than six months after his accident. On the other hand, you had the evidence of the hospital doctor. If you are in any doubt about the matter—and I am not going through Mr Gleave's evidence again—if you are in any doubt about this matter, if you are not sure, you will acquit [the appellant]. It is entirely a matter for you. You may think that his refusal was without reasonable excuse. If you do, you will convict him. If you are not satisfied that it was without reasonable excuse, then you will acquit him. There it is. It is in a narrow compass, members of the jury. It comes down ultimately to this one point. You have to decide it upon the evidence. Will you consider your verdict?'

The last thing this court wishes to do is to discourage brevity and simplicity in a summing-up, but, with all respect to the learned deputy chairman, this court thinks that the matter was not altogether simple and that the jury may not have understood clearly what the issue was.

The jury should have been directed that it was for the Crown to prove that the appellant's admitted failure to provide a specimen was without reasonable excuse, that the reasonable excuse put forward by his defence was that the appellant was suffering from concussion and that the effects of that concussion were that he was confused at the time when he refused to give a specimen. They should have been told that the doctors agreed that he was suffering from concussion to some extent and that the issue was whether that concussion had so confused his mind that he had a reasonable excuse for refusing to give a specimen. Finally, they should have been told that, if they thought the appellant might have been so confused, they should acquit him.

We appreciate counsel for the Crown's point that in one passage the summing-up may have been, if anything, too favourable to the appellant. Further, we do not wish to qualify in any way the observations of LORD PARKER CJ in *Rowland v Thorpe* (1) that the mental condition or the physical injuries must be of a very extreme character to constitute a reasonable excuse. It may be that the appellant is fortunate, in the light of the evidence as to his mental condition and physical injuries, to have his conviction quashed on this ground also. But, in our opinion, this summing-up was defective in its solitary reference to concussion and its failure clearly to relate the evidence about it as to the reasonable excuse on which the appellant relied.

The appeal against sentence must succeed with the appeal against conviction. The appellant has been in prison a little over five weeks and must be released forthwith. We have no power to give any directions about this matter, but we express the hope that should the appellant commit any further offence during the period for which his sentence was suspended, the court before which he comes will consider, before putting it into operation, the weeks which he has spent in prison awaiting the hearing of this appeal.

*Conviction quashed.*

Solicitors: Registrar of Criminal Appeals; Heckford, Norton & Co, Letchworth.



COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND CAIRNS, LJ, AND SWANWICK, J)

14th, 24th May 1971

R v SOUTER

*Dangerous Drugs—Occupier permitting premises to be used for smoking cannabis—‘Permitting’—Reasonable grounds for suspicion—Failure to take reasonable steps readily available to prevent prohibited act—Dangerous Drugs Act, 1965, s 5 (a).*

On a charge of permitting premises occupied by the defendant to be used for the purpose of smoking cannabis, contrary to s 5 (a) of the Dangerous Drugs Act, 1965, the word ‘permit’ must be taken to mean actual knowledge that the premises were being so used or knowledge of circumstances such that the defendant could be said to have shut his eyes to the obvious or allowed matters to go on without caring whether or not the smoking of cannabis had been taking place. Where, therefore, the jury had been directed that reasonable ground for suspicion was sufficient to constitute permitting,

HELD: this was a misdirection, because it equated reasonable ground for suspicion, which was objective, with suspicion itself, which was subjective, and, further, equated suspicion with knowledge.

The element of unwillingness on the part of the defendant to use means available to him to prevent the prohibited act is an essential element of the offence. The best proof of such unwillingness is failure to take reasonable steps readily available to the defendant to prevent the offence. Conversely, all steps taken by the defendant to prevent the offence have a direct bearing on the charge and should be brought to the attention of the jury.

APPEAL by Raymond John Souter against his conviction at Hampshire Quarter Sessions before the deputy chairman of permitting premises to be used for the smoking of cannabis, contrary to s 5 (a) of the Dangerous Drugs Act, 1965, when he was sentenced to six months’ imprisonment suspended for three years.

R A Rosen for the appellant.

I A Kennedy for the Crown.

*Cur adv vult*

24th May. EDMUND DAVIES LJ read this judgment of the court. By leave of the single judge, Raymond Souter appeals against his conviction at Hampshire Quarter Sessions on 26th June 1970 of permitting the living-room in a house occupied by him in Farnborough to be used for the smoking of cannabis, contrary to s 5 of the Dangerous Drugs Act 1965. Leave to appeal was granted because of the deputy chairman’s direction regarding the connotation of ‘permitting’.

On the evening of 18th April 1970, police went with a search warrant to a house in Reading Road owned by the appellant, who let out some of the rooms but retained the living-room for his own occupation. The premises were searched, and in a waste bin in the downstairs living-room were found a syringe and a hypodermic needle. In an ashtray was found a cigarette end which was later discovered to contain a measurable quantity of cannabis resin or cannabis. In a drawer of a sideboard were found three used syringes. When asked about the syringe and hypodermic needle found in the waste bin, the appellant said that they were not his and that he did not use syringes. When further questioned, he said: ‘They could be anybody’s, a lot of people come in here when I am out’. Questioned about the other three syringes, he said: ‘The same thing applies: they are not mine; I do not know whose they are’. Referring to the cigarette end, he was told that it appeared to be the remains of a cannabis cigarette and he was asked if it was his; the appellant replied: ‘No, like I say, a lot of people come here’. There was an ornamental pipe on a

window ledge which had certainly not been recently used, but in the bowl there were traces of what turned out to be cannabis. He was asked if he had smoked cannabis in it, and he replied: 'No, I bought it in a second hand shop some time ago'. He was asked if he had used it, and he replied that he did not think so. On the door of the appellant's room was displayed a notice which ran: 'If there is the slightest suspicion that there are illegal drugs of any sort or in any form on these premises, the police will be called immediately'.

After analyses had been carried out, the appellant was again interviewed by the police, having been cautioned, and was told that the cigarette end and pipe did contain restricted substances. He said: 'Well, I don't use it'. He then made this statement:

'A number of people who use drugs do come to my house from time to time, and I have at the moment one drug user staying with me permanently and one staying with me temporarily. I do not mind the legal drug users using drugs in my house, but do not like drugs being used illegally in the house. When the police came to my house, they found cigarette ends in an ash tray in my living-room and in a waste paper basket in Peter Bennett's room. I have been shown them and I recognise them as "roach" ends that is that they have contained cannabis. I did not know anything about them being smoked. When we first moved in, a lot of people who came to the house smoked cannabis, but I tried to stop it by telling them not to and by putting a notice up on my living-room door. I have used cannabis myself, but not for a very long time. As regards the pipe, I bought that in a second hand shop in Cove. I can't remember when I bought it or how much I paid for it but it was a long while ago. As regards the syringe containing amphetamine I do not know anything about it. It is not mine or my wife's. It could be anybody's who come round here. I have seen syringes in my living-room but I assumed they belonged to the legal drug user.'

In the course of his evidence the appellant said that he had a strong desire to help drug addicts, and that he had done this in the first place by taking them in as lodgers and later by making his house open to them in the sense that he left the back door permanently open and allowed them to wander in and doss down in the living-room. He said that he had known that his living-room was being used by licensed addicts and had been willing for that to continue, but he insisted that he had not permitted or allowed anyone to smoke cannabis in his premises and that he had no reason to suspect that this was being done. He claimed that, by putting up the notice, he had taken all reasonable steps to prevent any such thing happening. Further evidence was given by Mr Bennett to the effect that he had twice been turned out of the appellant's room when he discovered that Mr Bennett was in unlawful possession of drugs. Mr Bennett admitted knowledge that his own room in the same house was being used from time to time for cannabis smoking, but asserted that he had never seen this going on in the appellant's living-room. Further, a Mr Paul testified that on occasions he had been to the appellant's house, had seen the notice on the living-room door, and that in February 1970 he had twice seen the appellant turn out of the house some 'skinheads' because they were carrying 'pills'. He was not cross-examined, yet his testimony, like that of Mr Bennett, was nowhere referred to in the summing-up.

In directing the jury, the deputy chairman said:

'Now did, then, the [appellant] permit the smoking in the room? Well now, this question of permission involves *knowledge*. He is not guilty of permitting the smoking of that cigarette in the room unless he knew that the room would be used by someone for the purpose of smoking the cigarette there, and failed to

take means to prevent the smoking of the cigarette there . . . if you do come to the conclusion that the cannabis cigarette was smoked in that room, did the defendant know or have grounds for reasonable suspicion that the room would be used by someone for that purpose? If he knew that, did he take steps to prevent it? . . . Well, on this question you will have to consider the evidence, including, most importantly, the evidence of the [appellant] that the house was habitually used by drug takers, registered and unregistered; and you will have to take into account the fact that at any rate when he took over the house in September 1969, cannabis was much smoked there; and that, as he put it, he did his best to prevent it; and you will no doubt want to take into account the fact that he found it necessary to put up on his door a notice about taking drugs, not confined to cannabis, but drugs in general . . . if you do think that he had reasonable grounds for suspecting that the room would be used for smoking cannabis . . . you will go on to ask the final question: . . . did he take adequate steps to prevent it? . . . Do you think that putting up this notice was sufficient, having regard to what we are talking about? . . . We are talking about people addicted to dangerous drugs, some of them entitled to use them by law, and some of them not entitled to use them. We are talking about a situation where such people are lodging in the house. We are talking about a situation where other such people were free to wander in and out of the house, more or less at will . . . Would you have considered that you were taking adequate precautions against the smoking of cannabis in your room simply by putting up this notice? It is a matter for you to decide.'

There was a good deal more on the same lines, and a repeated direction that 'the only precaution he did take was to stick this notice up'. Counsel for the appellant submits that its general effect was both inadequate and erroneous in at least one important aspect. He first complains that the direction that the house was 'habitually used by drug-takers, registered and unregistered' was not supported by the evidence, but in the sense that both classes *resorted* there frequently it seems to us perfectly correct. More open to criticism, we think, is the reiteration of 'reasonable grounds for suspicion' as being sufficient to support the charge. In *Grays Haulage Co Ltd v Arnold* (1), where the charge was one of permitting a driver to drive continuously beyond the permitted periods, LORD PARKER CJ said:

'In my judgment, there is a tendency today to impute knowledge in circumstances which really do not justify knowledge being imputed . . . knowledge is really of two kinds, actual knowledge, and knowledge which arises either from shutting one's eyes to the obvious, or, what is very much the same thing but put in another way, failing to do something or doing something not caring whether contravention takes place or not.'

Later, in commenting on an unreported case where the justices had said that knowledge could be imputed when a man failed 'to take adequate steps to prevent defects occurring by an inadequate system of maintenance of vehicles', LORD PARKER described this test as 'completely wrong', and continued:

'Knowledge is not imputed by mere negligence but by something more than negligence, something which one can describe as reckless, sending out a car not caring what happens.'

He concluded by adopting as the test of 'permitting':

' . . . actual knowledge or knowledge of circumstances which fixed them, as it were, with a suspicion or knowledge of circumstances so that it could be said that

(1) 130 JP 196; [1966] 1 All ER 896.

they had shut their eyes to the obvious, or had allowed something to go on, not caring whether an offence was committed or not.'

If that be the proper test, as we respectfully think it is, the direction given in the present case clearly does not conform to it. It equated 'reasonable ground for suspicion' with suspicion itself, whereas the former is objective, while the latter is subjective, and 'suspicion' is itself being equated with 'knowledge'. Counsel for the appellant, while accepting that wilful blindness to an activity would be sufficient to impute knowledge, submits that 'grounds for suspicion' (whether reasonable or otherwise) fall far short of 'wilful blindness.' For the Crown, on the other hand, the direction given is sought to be upheld as following faithfully the words employed by LORD DIPLOCK in *Sweet v Parsley* (2), a case based on s 5 (b) of the 1965 Act, when, contrasting that paragraph with s 5 (a) he said:

'Here the word "permits" used to define the prohibited act in itself connotes as a mental element of the prohibited conduct *knowledge or grounds for reasonable suspicion on the part of the occupier* that the premises will be used by someone for that purpose and an unwillingness on his part to take means available to him to prevent it.'

A little earlier, LORD DIPLOCK had said that "permit" connotes *at least knowledge or reasonable grounds for suspicion*, and it is important to note that he throughout insists on 'unwillingness' by the accused to use means available to him to prevent the prohibited act. Both elements are, to his way of thinking, clearly indispensable to the concept of 'permitting'. The best indication of such unwillingness is proof of failure to take reasonable steps readily available to prevent the prohibited activity. Conversely, all steps taken by the accused to prevent it have a direct bearing on the charge and should be brought to the attention of the jury.

In this respect, if in no other, we think that the jury were misdirected. Even on the appellant's version, the situation was a curious one, while the appellant himself, as well as his attitude towards addicts, might well strike many as extremely odd. In the circumstances of which he had undoubted knowledge, vigilance on his part was clearly called for lest those admitted through his ever-open door abused his hospitality. Even so, there was a limit to what he could do. He could, of course, have locked his door against all comers, and counsel for the Crown strongly relies on his failure to do this as supporting the charge. But that would have defeated the laudable object which he claimed to be aiming at and which, if true, was one certainly within the law. If one makes the assumption that he might be genuine in this claim, what could the appellant do more than he in fact did? He had a living to earn and he worked long hours. The notice he put up was in unmistakable terms. Furthermore—and this is where the deputy chairman unfortunately fell into error—it might well be considered that, by his actions, he demonstrated that the notice meant what it said, for there was the unchallenged evidence that certainly on two occasions he was as good as his word and turned away those who abused his hospitality. Unfortunately, this evidence was never referred to in the summing-up. On the contrary, the jury were told in express terms that the appellant did nothing but put up the notice. We regard this unfortunate error as one of substance. It might well have induced the jury to take the view which the deputy chairman himself seems to have formed that the notice was but part of a charade calculated to shield the appellant in the event of his unorthodox actions becoming the subject-matter of investigation.

In the result, we have come to the conclusion that this conviction ought not to stand. We therefore quash it by allowing the appeal.

*Conviction quashed.*

Solicitors: Registrar of Criminal Appeals; P T L Danks, Winchester.

T.R.F.B.

(2) 133 JP 188; [1969] 1 All ER 347; [1970] AC 132.

QUEEN'S BENCH DIVISION

(WIDGERY, CJ, ASHWORTH AND WILLIS, JJ)

14th May 1971

R v IPSWICH JUSTICES. Ex parte ROBSON

*Road Traffic—Heavy goods vehicle—Driver's licence—Application to licensing authority—Insufficient driving experience of applicant—Refusal—Appeal to justices—"Person aggrieved"—Power in justices to order authority to grant licence—Road Traffic Act, 1960, s 195 (2), Sch. 15, para 1.*

The applicant, under the transitional provisions of para 1 of Sched 15 to the Road Traffic Act 1960, applied to the licensing authority, the chairman of the Traffic Commissioners for the relevant area, for a driver's licence for a heavy goods vehicle under s 192 (1) of the Act. During the year immediately preceding his application, the applicant had had only 4½ months' driving experience instead of the six months required by Sched 15. The licensing authority, as he was bound to do, refused the application. The applicant appealed to justices under s 195 (2) of the Act, contending that he was a "person aggrieved" by the refusal of the licensing authority. The justices were of opinion that on an appeal under s 195 (2) they had power to make such order as they thought fit, and accordingly they ordered the licensing authority to grant the applicant a licence. On an application by the licensing authority for certiorari to quash the order of the justices,

Held: certiorari must issue as the justices were not empowered by s 195 (2) to order the licensing authority to do something which he had otherwise no power to do, nor was the applicant a "person aggrieved" within the meaning of the subsection, since he had not been deprived of anything which the licensing authority had power to give him.

MOTION by Herbert Ernest Robson, chairman of the Traffic Commissioners for the Eastern Traffic Area, for an order of certiorari to bring up and quash an order made by the Ipswich justices on 14th January 1971, whereby it was ordered that Robert Frederick Kenneth Callaway be granted a heavy goods vehicle driver's licence.

Gordon Slynne for the applicant.

F H L Petre for the respondent.

**LORD WIDGERY CJ:** In these proceedings counsel moves on behalf of the applicant, Herbert Ernest Robson, who is the chairman of the Traffic Commissioners for the Eastern Traffic Area, and as such is by virtue of s 193 (1) of the Road Traffic Act 1960 the licensing authority having the power and duty to grant heavy goods vehicle drivers' licences pursuant to Part V of that Act. The relief sought is an order of certiorari to bring up to this court and quash an order made by the justices for the county borough of Ipswich on 14th January 1971 whereby it was provided that one Robert Frederick Kenneth Callaway be granted a heavy goods vehicle driver's licence, notwithstanding the provisions contained in Sch 15 to the Road Traffic Act 1960.

These proceedings raise a relatively short, but extremely important, question affecting the extent of the right of appeal to justices conferred by s 195 of the Road Traffic Act 1960 in regard to the granting of heavy goods vehicle drivers' licences. Briefly the relevant legislation takes the following form. In the Road Traffic Act 1960, s 192 (1), it is provided:

'On and after the appointed day a person shall neither drive a heavy goods vehicle on a road unless he is licensed for the purpose under this Part of this Act or is licensed under Part III of this Act to drive all types of single-deck public



service vehicles, nor employ a person who is not so licensed to drive a heavy goods vehicle on a road.'

Section 193 sets out the machinery dealing with applications for the grant of a heavy goods vehicle driver's licence and among other things provides that the chairman of the traffic commissioners shall be the licensing authority for this purpose. Section 193 (2) in its original form provided that the licensing authority might require an applicant for a heavy goods vehicle driver's licence to take a test, but the test was not at that time obligatory. There was further provision whereby the licensing authority might suspend or revoke a heavy goods vehicle driver's licence in appropriate circumstances. Those provisions were very much tightened up by the Road Safety Act 1967, s 19 (2) of which provides:

'Subject to the transitional provisions contained in schedule 15 to the [Act of 1960], the licensing authority shall not grant a full licence to drive a heavy goods vehicle of any class unless he is satisfied that the applicant for the licence—(a) has at some time during the period of ten years ending on the date of the coming into force of the licence passed the prescribed test of competence to drive vehicles of that class; or (b) has within that period held a full licence authorising the driving of vehicles of that class.'

I pause there to observe that under the terms of that subsection there is a mandatory requirement on the licensing authority that he shall not grant a full licence to drive a heavy goods vehicle unless one or other of the conditions in the subsection is satisfied or relief on the part of the applicant can be obtained under the transitional provisions of Sch 15 to the 1960 Act. One must go back then to consider what those transitional provisions were. Paragraph 1 of Sch 15 provides:

'On the first application for a heavy goods vehicle driver's licence made, on or after the day of the making of the order appointing a day for the purposes of section one hundred and ninety-two of this Act, by a person who satisfies the licensing authority that in the course of the year ending on the first-mentioned day he has been during any period or periods of, or amounting in the aggregate to, six months, in the habit of driving a heavy goods vehicle and on payment of the fee prescribed for the purposes of section one hundred and ninety-six of this Act, the licensing authority shall grant the licence...'

So subject to the conditions specified in Sch 15 there is an obligation on the licensing authority to grant a licence, and this is an obligation not affected by s 19 (2) of the 1967 Act. By the Road Safety Act 1967, Sch 1, para 20, para 1 of Sch 15 to the 1960 Act is amended so as to substitute 'the year ending on the day specified in that behalf in the order' for the words 'the year ending on the first mentioned day'.

There is an order, the Heavy Goods Vehicles (Drivers' Licences) (Commencement) Order 1969 which fills in the appropriate dates in para 1 of Sch 15, and this order was made on 1st July 1969. That is relevant because the terms of para 1 of Sch 15 are concerned with a first application made on or after the date of the making of the relevant order. The date of the making of the relevant order therefore is 1st July 1969. Paragraph 1 provides that the day specified for the purposes of para 1 of Sch 15 to the 1960 Act as amended shall be 1st February 1970.

So to put the matter as it seems to me according to its essentials, it would have been open to Mr Callaway in this instance, to claim a heavy goods vehicle driver's licence under Sch 15 if he had been able to show that for a period of six months in the relevant year he had been in the habit of driving a heavy goods vehicle. In fact through no fault of his own he was unable to show this, and it is conceded now, indeed it is



common ground between the parties, that he did not bring himself within the terms of para 1 of Sch 15 because during the relevant years he was engaged in driving only for a period of 4½ months, not the period of six months required by the Schedule.

The result was that when he came to make an application to the licensing authority for a heavy goods vehicle driver's licence, the licensing authority had to refuse him. There is no argument about it; it had to refuse him because he did not satisfy either of the conditions in s 19 (2) of the 1967 Act, nor did he come within Sch 15 to the 1960 Act. However, he invited the licensing authority to review his case as he was entitled to do under s 195 of the 1960 Act, and he was told quite correctly that no review was effectively possible because the authority had no power in his circumstances to grant the licence.

He thereupon went by way of appeal to the justices by virtue of the provisions of s 195 which so far as is relevant provide:

'(1) A person who, being the holder of, or an applicant for, a heavy goods vehicle driver's licence, feels aggrieved by the refusal or failure of the licensing authority to grant, or by the suspension or revocation of, such a licence, or by any limitation imposed thereon, may by notice in writing to the licensing authority require him to reconsider the matter, and shall on a reconsideration be entitled to be heard either personally or by his representative.

'(2) A person who is so aggrieved as aforesaid, or who is dissatisfied with the decision of the licensing authority on reconsideration of the matter, may appeal—  
(a) if he resides in England or Wales, to a magistrates' court acting for the petty sessions area in which he resides, (b) if he resides in Scotland, to the sheriff within whose jurisdiction he resides, and on any such appeal the court or sheriff may make such order as it or he thinks fit and an order so made shall be binding on the licensing authority.'

So Mr Callaway appealed to the Ipswich justices under the terms of that section.

When the matter came before the justices there was some indecision, I think one can fairly say, on the part of the advocates representing the parties, whether the justices had or had not, under those terms, the power to direct the issue of a licence in circumstances in which the licensing authority itself had no such power. Put shortly, the question arose before the justices whether they could as a matter of mercy and sympathy give Mr Callaway his licence when it was clear that the licensing authority could not do so. The justices took the view that they had an extended jurisdiction, extended beyond the jurisdiction of the licensing authority, and being doubtless swayed by the ill-luck which Mr Callaway had suffered, they made an order that a licence should be granted to him.

Counsel for the applicant moves for certiorari to quash that order because he says that it was without jurisdiction. That is the short point with which we are concerned. First of all it is contended that Mr Callaway was not a person aggrieved within the meaning of s 195, because he had not been deprived of anything which the licensing authority had power to give him, and therefore could not suffer a grievance sufficient to bring him within the terms of the section. I think for my part that this is a perfectly good argument on the facts of this case, and I refer, as we were referred, to *R v Cumberland Justices, ex parte Hepworth* (1). That was a case in which a driving licence under Part II of the Road Traffic Act 1930 was in question, and the relevant Act provided that if the would-be driver's declaration showed on its face that he was suffering from a disease or disability which disqualified him, then the licensing authority must refuse to grant a licence; it is really exactly the same situation as we have here. There was, as here, a power of appeal by a person aggrieved. The

(1) 95 JP 206; [1931] All ER Rep 717.

applicant for the licence in that case sought to appeal, although he had on the face of his application form admitted a disability which was sufficient to require the licensing authority to refuse him. The Court of Appeal decided that the justices had no power to hear the appeal on the grounds that the applicant was not a person aggrieved. But I do not think, speaking for myself, that the matter rests there; nor would I wish to make the grounds of my decision turn primarily on the much debated and often vexed question of who is a person aggrieved. I think in the present case a shorter and to my mind much more satisfactory ground can be found by going back to s 195(1) and considering its terms again. If a person aggrieved appeals to the justices, the justices may, according to the section, make such an order as they think fit, and any order so made shall be binding on the licensing authority. It seems to me quite clear that what is contemplated there is that the justices shall have power to give a direction, and the licensing authority shall then be required to follow it. But how, I ask myself, can it be supposed that Parliament intended the justices to be able to order the licensing authority to grant a licence in total defiance of s 19 of the 1967 Act and the prohibition on grant which applied in this case?

I do not think that s 195 (2) allows the justices in any case to order the licensing authority to do something which he had otherwise no power to do. Any other construction of the section seems to me to be extremely difficult. Any other construction of the section might well allow the justices to drive a coach and four through the whole licensing system for heavy goods vehicles, and I do not believe that Parliament intended the justices to have that power. Accordingly as it seems to me counsel for the applicant makes out his case on both of those grounds, although I express a personal preference for the latter.

Counsel for the respondent has conceded, and I think rightly conceded, that he cannot argue that Mr Callaway was a person aggrieved in the face of the authorities, but he points out that in the context of this section the reference is to a person who feels aggrieved, and he contends with some force that that may be a wider phrase, and that that may give Mr Callaway a status before the justices which he would not otherwise have. I for my part cannot accept that a person may feel aggrieved for this purpose when the licensing authority has done no more than follow the precise and specific terms of the statutory direction imposed on it. I do not think that even the additional relaxation obtained by the introduction of the word 'feels' is enough to help counsel for the respondent on that.

It was finally argued, albeit somewhat faintly, that in our discretion we should refuse the order because the representative of the applicant had not made his position clear enough when the matter was before the justices. All I think I need say on that is that I do not find any real substance for the suggestion that the conduct of the parties before the justices should influence our decision in this case in that way. Accordingly I would allow the order to go.

**ASHWORTH J:** I agree.

**WILLIS J:** I agree.

*Order for certiorari.*

Solicitors: *Treasury Solicitor; Eric Blakey & Co, Ipswich.*

T.R.F.B.

CHANCERY DIVISION

(PLOWMAN J)

5th, 13th May 1971

GREATER LONDON COUNCIL v LONDON BOROUGH OF CROYDON

*Local Government—London—Transfer of land—Land held for two purposes—Vesting in borough Council*

Article 4 (1) of the London Authorities (Property etc.) Order (SI 1964 No 1465) provides: 'Where any land is held by an authority for two or more purposes, it shall be deemed for the purposes of . . . this order to be held for such one of those purposes as is determined by that authority to be the purpose for which the land is, immediately before 1st April 1965, mainly used.'

On 1st April, 1965 by virtue of the above-mentioned order which was made under s 84 of the London Government Act 1964, property held for fire service purposes vested in the plaintiff, the Greater London Council, and property held for library purposes vested in the appropriate London borough. At the material time there was in Croydon a building known as the Emergency Equipment Store, the ground floor of which was used for storing fire service equipment, and the first and second floors of which was used for library purposes. Up to the end of the war in 1945 the entire building had been used solely for the Auxiliary Fire Service, but thereafter the ground floor only was used for the storage of fire service equipment. In 1962 the defendant borough, through the council's finance committee, appropriated the first and second floors of the building for library purposes. On a summons to determine whether the building, on 1st April 1965, had vested in the plaintiff or in the defendant,

Held: the site of the Emergency Equipment Store was clearly 'land' held by the defendant borough for two purposes within art 4 (1) of the order, and the council therefore, could, and, indeed, did, make a determination which resulted in the site vesting in the defendant borough council.

ADJOURNED SUMMONS taken out by the Greater London Council, seeking to determine whether, on the true construction of the London Authorities (Property etc) Order 1964, a three-storey building situated at Old Town, Croydon, known as the Emergency Equipment Store, became on 1st April 1965 (pursuant to the order) vested in the plaintiff or in the defendant, the London Borough of Croydon.

*H E Francis QC and Gerald Godfrey QC for the plaintiff.*

*Leolin Price QC and Elizabeth Appleby for the defendant.*

*Cur adv vult*

13th May. **PLOWMAN J** read the following judgment: This is a friendly action, brought to determine a point of construction arising under a statutory instrument known as the London Authorities (Property etc) Order 1964 SI 1964 No 1464 (which I will call 'the order'), which was made by the Minister of Housing and Local Government in September 1964 in exercise of his powers under s 84 of the London Government Act 1963. That Act, so far as is material to this action, constituted the plaintiff, the Greater London Council, the fire authority for the whole of Greater London, and the London boroughs, which include the defendant, the London Borough of Croydon, the library authorities, within those boroughs. The effect of the legislation was that on 1st April 1965 property then held for fire service purposes vested in the Greater London Council, while property then held for library purposes vested in the appropriate London borough.

What I am concerned with is a building at Croydon which was held for the dual purposes of the fire services and a library. The building in question is a three-storey detached building known as the emergency equipment store; and, for further

details of the matter, I cannot do better than refer to the affidavit of Mr Blessley, the valuer and estates surveyor to the Greater London Council. He states this:

'The Emergency Equipment Store is one of a number of buildings erected within the boundaries of the land at Old Town, Croydon, which boundaries are substantially as shown edged red on the plan . . . (which land I shall call "the Fire Station Site"). There is also . . . an album of photographs of the Fire Station Site.'

I pause there to say that the only access to the emergency equipment store is over the drill yard of the fire station and that the emergency equipment store appears from the plan to occupy something like one-tenth of the whole site. Mr Blessley then continues:

'On 1st April 1965, the Fire Station Site, and the buildings thereon (save for the Emergency Equipment Store) were occupied wholly for fire brigade purposes. The ground floor of the Emergency Equipment Store was occupied for fire brigade purposes; but the first floor and the second floor were occupied for library purposes. The previous history of the Fire Station Site may be briefly summarised as follows. The majority of the properties comprised in the Fire Station Site were acquired by the Croydon County Borough Council (which I shall call "the Croydon Council") for street improvement purposes under the Croydon Corporation Act, 1930. Of the remaining properties, some were acquired for housing purposes, and some for general purposes. In July 1938, the Croydon Council decided it was necessary to build a new fire station, including accommodation for the auxiliary fire service, and approved in principle the appropriation of the Fire Station Site (then known as "The Old Town Site") for fire brigade purposes. The building of the new fire station itself had to be postponed because of the War (in fact, it was not completed until 1961); but in May 1939, the Croydon Council decided under powers conferred by the Air Raids Precautions Act 1937 and the Civil Defence Act 1939 to build the Emergency Equipment Store to house Auxiliary Fire Service equipment. The Emergency Equipment Store was duly built and was in fact used for housing Auxiliary Fire Service equipment throughout the War and as a training centre for officers and men of the fire service.'

I pause again there to say that in 1942 the Croydon Council, with the approval of the Minister of Health, formally appropriated the fire station site to the purposes of the fire brigade. The affidavit then goes on:

'From the end of the war until 1961, the Emergency Equipment Store was used for purposes other than fire service purposes; but in 1961, the ground floor of the Emergency Equipment Store was again turned over to the storage of Auxiliary Fire Service equipment and housing and training auxiliary fire service personnel. In 1962, the Croydon Council appropriated the first and second floors of the Emergency Equipment Store for library purposes.'

Breaking off at that point, that appropriation was effected by a recommendation of the finance committee, confirmed by the council on 23rd July 1962, in the following terms:

' . . . that, subject to any necessary Ministry consent, the first and second floors of the Emergency Equipment Store should be appropriated for Library purposes.'

On enquiry, it emerged that no Ministry consent was necessary. The affidavit continues:

'Accordingly, the position, immediately before 1st April 1965, was that the ground floor of the Emergency Equipment Store was used for Auxiliary Fire Service purposes as mentioned above while the first and second floors of the Emergency Equipment Store were used for library purposes. Apart from the Emergency Equipment Store, the whole of the remainder of the Fire Station Site was used for fire service purposes... On 1st April 1965, pursuant to sections 48 and 49 of the London Government Act 1963, the plaintiff became the authority responsible for fire services (including auxiliary fire services) in the area previously administered by the Croydon Council. By virtue of article 12 of and schedule 3 to the London Authorities (Property etc.) Order 1964 (which I shall call "the order") all the property held by the Croydon Council for fire service purposes became vested in the plaintiff and all the property held by the Croydon Council for library purposes became vested in the defendant. By article 4 (1) of the order, it is provided as follows (so far as is material): "Where any land is held by an authority for two or more purposes, it shall be deemed for the purposes of... this order to be held for such one of those purposes as is determined by that authority to be the purpose for which the land is, immediately before 1st April 1965, mainly used." On 23rd November 1964 the defendant's predecessor the county borough of Croydon purported to determine, pursuant to article 4 (1) of the order, that the Emergency Equipment Store was mainly used for library purposes.'

I should add that art 4 para (2) provides in effect that, in the case of a dual use, the authority which fails to acquire the property is to be entitled to continue its use of it.

On 3rd November 1970 the Greater London Council issued the originating summons which is now before me, raising the following question:

'That it may be determined whether, on the true construction of the London Authorities (Property etc.) Order 1964, the 3-storey building situate at Old Town, Croydon known as the Emergency Equipment Store, became on 1st April 1965 (pursuant to the said Order) vested in: (i) the Plaintiff; or (ii) the Defendant.'

The answer to that question depends on a short point of construction, namely, what is the meaning of the words 'any land' and 'the land' in art 4 para (1) of the order. Counsel for the plaintiff submitted that the relevant land is the whole of the fire station site; that on 1st April 1965 this site was mainly used for fire service purposes, and that it was not open to the Croydon Council to reach any contrary conclusion. Counsel for the defendant, while conceding that the plaintiff's argument might be valid if the relevant land were the whole of the fire station site, submitted that it is not. He submitted that the relevant land is the site of the emergency equipment store; that the Croydon Council's determination that this building was mainly used for library purposes is unassailable, and that the effect of the order was therefore to vest it in the defendant. Counsel further submitted that since, under art 4, the initiative lay with the Croydon Council to make a determination, they were entitled to select such area as they reasonably considered appropriate to the circumstances. He submitted that the emergency equipment store had a history of separate identity and separate use, going back for 20 years before the rest of the fire station was built, and that the Croydon Council was therefore fully justified in treating the site of the emergency equipment store as the relevant land.

Counsel for the plaintiff, on the other hand, submitted that the emergency equipment store had no separate or distinct identity of its own; that it lay wholly within the fire station site and was without any curtilage or means of access except over the fire station yard; and that, since it was an integral part of the fire station site and not a separate unit, it did not qualify as 'any land' within the meaning of art 4. He

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CRIMINAL LAW – Sentence – Extended term of imprisonment – Not to comprise suspended sentence – Suspended sentence not to run consecutively to extended term – Matters appropriate to be considered in fixing length of extended term – Criminal Justice Act 1967, s 37. <i>R v Roberts</i> .. .. .	CA	415
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CRIMINAL LAW – Sentence – Suspension – Act providing minimum sentences for specified offences – Power of court to suspend sentence – Criminal Justice (Temporary Provisions) (Northern Ireland) Act, 1970, s 1 – Treatment of Offenders (Northern Ireland) Act, 1968, s 18 (1). <i>Kennedy v Spratt</i> .. .. .	HL	203
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further submitted that counsel for the defendant was wrong in suggesting that the Croydon Council was entitled to select the area to which it would apply its determination; and that, before any question of making a determination could arise, the appropriate area had to be identified objectively.

In my judgment, the defendant is entitled to succeed in this case whichever test is applied to the question, what is the relevant land? Applying counsel for the defendant's test, the site of the emergency equipment store is clearly land; it was held by the Croydon Council for two purposes, and the council therefore could and did make a determination which resulted in the site vesting in the defendant. On the other hand, in order to apply counsel for the plaintiff's test, one asks: what was the land which was held for two or more purposes? What land was held for the purposes both of the fire service and the library? Only, in my judgment, the emergency equipment store site. No other part of the fire station site, and in particular none of the other buildings on the site, was held for both these purposes, and the whole of the remainder of that site was held for fire purposes alone. In other words, when art 4 (1) speaks of land held for two or more purposes, it must, in my opinion, be taken to be referring to land substantially the whole of which can fairly be said to be held for two or more purposes; and I do not think that this is true of the fire station site as a whole. Counsel for the plaintiff's construction would involve reading into the article some such words as 'in whole or in part' between the word 'is' and the word 'held'; and I can see no necessity or justification for altering the language of the article in that way.

In the result, therefore, I will declare that the emergency equipment store became, on 1st April 1965, pursuant to the order, vested in the defendant.

*Declaration accordingly.*

Solicitors: H F W Wilson; Sharpe, Pritchard & Co, for Alan Blakemore, Croydon.

P.P.

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### COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND CAIRNS LJ, AND McKENNA J)

17th May 1971

R v MERRIMAN

*Criminal Law—Joint charge—Plea of guilty by one defendant—Other defendant convicted of committing offence independently—Direction to jury—Need to consider questions of common purpose.*

The appellant and F. were indicted on a count which charged them jointly with wounding P. with intent to do grievous bodily harm. F. pleaded guilty and the appellant was then tried alone. The commissioner directed the jury that the fact that F. had pleaded guilty had no relation to the issue which they had to try, and that, if they accepted P.'s evidence that the appellant stabbed him, they need not go into the question of common purpose and whether the appellant and F. were acting together. The appellant was convicted. On appeal,

**HELD:** it was not open to the jury, when trying a joint charge to which one defendant had pleaded guilty, to convict the other defendant of independently committing the offence which was the subject of the joint charge; the commissioner had, accordingly, misdirected the jury, and the conviction must be quashed.

APPEAL by John Michael Merriman against his conviction at Manchester Crown Court on an indictment containing two counts, one of jointly with his brother wounding with intent to cause grievous bodily harm and the other of assault occasioning actual bodily harm, he being then sentenced to six years' imprisonment.

*R Wood* for the appellant.

*K J Taylor* for the Crown.

**EDMUND DAVIES LJ** delivered this judgment of the court: This is an appeal from the conviction of John Michael Merriman on 10th September 1970 at the Crown Court at Manchester. By the first count in the indictment, he was charged jointly with his brother Frank of wounding William Parry with intent to do him grievous bodily harm. He was also convicted on a second count of assaulting a police constable and thereby occasioning him actual bodily harm. He received a sentence of six years' imprisonment on the first count, nine months' consecutive on the second count and a suspended sentence of six months imposed on him in November 1969 for unlawful wounding was ordered to be put into effect consecutively, so that he was in all sentenced to a totality of seven years and three months. His brother Frank pleaded guilty to the first count and was sentenced to five years' imprisonment. The matter comes before this court with the leave of the single judge.

It was not in dispute that on the night of 11th July 1970 the appellant and his brother Frank and their father were asked by Mr Parry, the licensee of a hotel in Rochdale, to leave his premises as they had taken too much drink. The two brothers were reluctant, but eventually they were escorted to the door. Mr Parry gave evidence that he got the party out through the double doors and was standing in the space between those doors and the front door when he felt a blow in the small of his back. He turned and saw the appellant with a knife in his hand. He was also attacked by Frank, the brother, who stabbed him, this time in the leg, and he was then again stabbed by the appellant. Eventually he got back into the hotel and was taken to the hospital in a grievous state. The indications were that he had sustained at least seven blows, and that the one inflicted originally had caused a very deep wound.

The appellant later told the police, 'Mixer Merriman, that's me. I have been at the Roebuck all night with our Francis and my dad. I have wounded nobody'. A little later he said:

'You're not on. I never stabbed Parry. You had better start looking for my brother. You can search me, I have no knife. You find Francis, he will tell you what happened.'

Later he said that he wanted to get the matter straightened out. He was informed that the police now had in their possession a knife which he was believed to have used, and on being cautioned he said: 'I saw Francis getting up by Parry so I went in also. That bastard Parry got what was coming to him.' Then he made a written statement in the course of which he said that he had walked away from the scuffle, but then turned around and saw Frank and Parry fighting, and the statement continued:

'I went back to them and tried to separate them and Bill Parry hit me so I hit him with my fists once or twice and we were all on the ground. I saw that my brother Frank had a knife and that Parry had been stabbed. I saw that Frank's face was covered in blood and then Parry got up and walked back to the pub. I dragged Frank away ...'

The appellant gave evidence on the lines of his statement, testifying that, having returned to the fight, he saw Mr Parry was beating up Frank, so he said that he tried to get in between the two to prevent any further bother. He later got rid of the knife.

The two brothers, as we have already observed, were in the first count jointly charged with wounding with intent. This was, and remained throughout, a joint charge. In these circumstances counsel for the appellant, who concedes, as indeed he must, that this appeal wholly lacks merit, makes complaint (which we are reluctantly compelled to regard as well founded) that the learned special commissioner misdirected the jury. Before we turn to the directions given, it is well to recall that the matter of joint charges has recently been dealt with by the Court of Criminal Appeal in *R v Scaramanga* (1) and by this court in *R v Parker* (2). We understand that unfortunately neither decision was cited below.

*R v Scaramanga* was a case where two people, charged jointly with doing malicious damage by night and with assault occasioning actual bodily harm, each pleaded not guilty and each was convicted. But their convictions were quashed because, as LORD PARKER CJ put it:

'In our judgment, except where provided by statute, when two persons are jointly charged with one offence, judgment cannot stand against both of them on a finding that an offence has been committed by each independently.'

The facts of that case were quite different from those in the present case, and the same observation can be made about *R v Parker* (2).

*R v Parker* was a shoplifting case where a Miss Overy and a Miss Parker were jointly charged with stealing two pairs of tights from a supermarket. Miss Overy pleaded guilty to that joint charge. The trial then proceeded against Miss Parker alone. In due course the jury were directed by the learned judge that if they found Miss Parker guilty, they should bring in a special verdict stating whether they had found her guilty of being jointly concerned in the theft of two pairs of tights, or of independently stealing one pair of tights. The jury having returned a general verdict of guilty, the clerk of the court asked them whether they found her guilty of stealing two pairs or one pair, and the reply by the foreman was 'One pair of tights'. Delivering the judgment of this court, which quashed the conviction of stealing one pair, DONALDSON J said:

'In our judgment the application of the principle which formed the basis of the decision in *Scaramanga's* case (1) does not depend upon whether one accused pleaded guilty and there was in consequence no "finding" in relation to that accused in the sense of a verdict by a jury. The principle is wider. It is clear law that if a person is accused of stealing two articles, he can be convicted if it be proved that he stole one only. It is also clear that if two persons are accused of stealing jointly, one or other or both may be convicted of that joint stealing. Alternatively, either, but not both, could be convicted of stealing independently.'

Then he went on to deal with the question whether in the event of any technical difficulty arising it was possible to invoke s 44 (5) of the Larceny Act 1916. In *R v Parker*, accordingly, the situation was that, Miss Overy having pleaded guilty to the joint charge, the verdict of the jury made it clear that the accused Parker was being convicted not on that joint charge but of the independent theft of one pair of tights. As the law stands that appears to be impermissible. But we think that, either by the

(1) 133 JP 343; [1969] 2 All ER 15; [1969] 2 QB 248.

(2) 127 JP 476; [1963] 2 All ER 852; [1963] 2 QB 807.

legislature or by another court, the position is one which calls for further consideration.

In the present case, as in *R v Parker*, Frank, the brother, pleaded guilty to the joint charge. The learned commissioner embarked on what we have reluctantly to describe as his misdirection by saying to counsel:

'I think it would be unsafe for the jury to consider the question of acting in concert if they were unable to accept Mr Parry's evidence in toto because if they accept his evidence completely then what he says is, "I was stabbed by [the appellant]. I was also stabbed by his brother", and that is what I am going to direct the jury to make their minds up about.'

The stage having been set in that way, the learned commissioner said of the first count:

'This was a joint charge with [the appellant's] brother Frank. You have not been troubled with Frank because Frank has pleaded guilty. That means no more than that Frank Merriman admits that he wounded Mr Parry with intent to do him grievous bodily harm. Now, that fact, of course, has no relation to the issue you have to try, that is whether on the evidence you are convinced that [the appellant] wounded Mr Parry with intent to do him grievous bodily harm.'

So on this joint charge the jury were being directed that it did not matter whether or not the appellant was acting in concert with his brother.

The commissioner later indicated what was the requisite intention in the circumstances of the case, and continued:

'Now, in opening the case to you, members of the jury, [counsel for the Crown] did explain that you may have two people responsible for a crime where they are acting in concert, even if it is only one man who does the wounding, if the other is there assisting, they may be jointly responsible. I said to [counsel] that I did not propose to direct you in this case on that basis. You can look at it much more simply than that. It may be that in giving you this direction, I am being unduly favourable to the [appellant] but you will appreciate this, that there are only two people whom we have heard in this court who really know what happened, one is Mr. Parry and the other is the [appellant], and I suggest to you that you weigh and consider Mr. Parry's evidence, make up your minds whether you think that he has given you a truthful and accurate account of what took place, because if you accept his account, you do not need to go into the question of common purpose, whether [the appellant] and his brother were acting together ...'

In a later passage the commissioner said:

'Of course, if the [appellant] came back to try and stop a fight, although he used an unorthodox method of trying to stop it by producing a knife or, as it would appear, actually using a knife, well, then you would acquit, but, of course, members of the jury, if you are convinced that Mr Parry's account is right, that [the appellant] was the one who started it by stabbing him in the back, you need not consider what went on after that.'

But when one recalls that his was a case where Frank had pleaded guilty to the joint charge, it was not, in the judgment of this court, right to say that to convict the appellant on that joint charge, it was sufficient to establish that he started the trouble

without adverting to the fundamental allegation that the two accused were acting in concert.

We are driven to the conclusion that this jury, who presumably acted on the direction that they were given, may well have asked themselves only one question: are we satisfied on Mr Parry's evidence that the appellant stabbed him in the back?

Because of the nature of the charge and of Frank's plea, and in the light of the authorities, we are forced to the conclusion that that was a misdirection. Furthermore, it is a misdirection of such a kind that it would, in our view, be improper to apply the proviso to cure the mischief which resulted therefrom. Accordingly, although with the utmost reluctance, this court finds itself faced with no alternative other than to allow this appeal and quash the conviction.

*Conviction quashed.*

Solicitors: *Edwin Slinger*, Accrington (for the appellant); *Registrar of Criminal Appeals* (for the Crown).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY CJ, ASHWORTH AND SWANWICK JJ)

26th May 1971

R v LEICESTER GAMING LICENSING COMMITTEE. Ex parte SHINE AND ANOTHER

*Gaming—Licensing of club—Form of application—Notice advertising making of application—Specific particulars to be included in notice—Notice including specified particulars and additional matter—Validity—Gaming Act, 1968, Sch 2, para 6.*

By sched 2, para 6, to the Gaming Act, 1968: '(1) At any time in March in the year in which . . . an application [for the grant of a licence under the Act] is made, the applicant shall cause notice to be published by means of an advertisement in a newspaper circulating in the licensing authority's area; (2) a notice published in pursuance of this paragraph shall specify the name of the applicant, the name of the club and the location of the relevant premises, shall indicate whether the application is for a bingo club licence; and shall state that any person who desires to object to the grant of the licence should send to the clerk of the licensing authority, before 15th April, two copies of a brief statement in writing of the grounds of the objection . . . (4) A notice published or displayed under this paragraph shall not include any matter which is not required by the preceding provisions of this paragraph to be included in it.'

The applicants, who had made application to a gaming licensing committee for a general certificate in the form prescribed by para 5 (2) of Sch 2 to the Act, failed to comply with para 6 (4) of Sch 2 in that the advertisement by which notice of the application was published contained, in addition to the particulars required by para 6 (2) to appear therein, other extraneous matter. The gaming licensing committee refused to hear the applicants' application for a licence, holding that they had no jurisdiction to hear it by reason of the irregularity in the advertisement. On a motion by the applicants for an order of mandamus directing the licensing committee to hear the application,

**HELD:** mandamus should not issue, since paras 5 to 7 of Sch 2 to the Act contained a complete and precise code intended to be strictly enforced, and the additional matter included in the advertisement rendered the advertisement an invalid notice for the purposes of Sch 2, para 6; accordingly the licensing committee had rightly held that they had no jurisdiction to hear the application.

**MOTION** by Mark Shine and Leonard Lewis Davis for an order of mandamus directed to the gaming licensing committee of the city of Leicester requiring them



to hear and determine according to law an application for the grant of a licence under the Gaming Act 1968 in respect of property situate at 32 Charles Street, Leicester, for the purpose of a club named the Rubicon Club for gaming during licensing hours.

*John Lloyd-Eley QC and J F Kingham for the applicants.*

The respondent gaming licensing committee did not appear.

**LORD WIDGERY CJ:** In these proceedings counsel moves on behalf of the applicants, Mark Shine and Leonard Lewis Davis, for an order of mandamus directed to the gaming licensing committee for the city of Leicester commanding it to hear and determine according to law an application for the grant of a licence under the Gaming Act 1968 in respect of the first and part of the second floors of the property situate at 32 Charles Street, Leicester. The gaming licensing committee refused to hear the applicants' application on the grounds that, in the view of the committee, there had been an irregularity in the manner in which the application had been made and advertised, and that as a consequence of that irregularity the committee were of the opinion that it had no jurisdiction to hear an application. The applicants had obtained consent of the Gaming Board to make the application, and the application which ultimately was made to the gaming licensing committee was in itself in proper form. The question arises in regard to the advertisement of that application under the terms of Sch 2 to the Gaming Act 1968.

Before I turn to the details, it is as well to observe that under s 11 of the Gaming Act 1968 it is provided:

'(1) The provisions of schedule 2 to this Act shall have effect with respect to the licensing of premises under this Act.'

It is also useful, before turning to the schedule, to remind oneself that s 42 of the 1968 Act imposes considerable restrictions on the advertising of gaming and places at which gaming is carried on. Section 42 provides:

'(1) Except as provided by this section, no person shall issue, or cause to be issued, any advertisement—(a) informing the public that any premises in Great Britain are premises on which gaming takes place or is to take place, or (b) inviting the public to take part as players in any gaming which takes place, or is to take place, on any such premises . . .'

The section goes on to deal with other matters, but the extract is sufficient if I stop there. Section 42 (3), however, provides:

'Subsection (1) of this section does not apply to . . . (b) the publication or display of a notice, where the notice is required to be published or displayed by any provision of schedules 2 to 4 to this Act and the publication or display is so made as to comply with the requirements of that provision.'

It is there recognised that an element of advertisement of the gaming is inevitable under the provisions of Sch 2, and exemption is given against the penal consequence of s 42 where the only advertisement is one which is required by, inter alia, Sch 2, and is made so as to comply with the requirements of that schedule.

So one goes to Sch 2 itself. We are concerned with that part of the schedule which comes under the cross-heading 'Application for grant of licence (general provisions)'. I say that because a somewhat different code is prescribed in regard to other forms of application. Under para 5 (1) of Sch 2 provision is made as to the dates between which an application is to be made; para 5 (2) requires the application to be made to the clerk to the licensing authority in such form and manner as may be prescribed.

It goes on to deal with certain matters which shall be specified in the application. Paragraph 5 (3) requires that when the application has been made a copy of the application shall be sent to the clerk, to which I need not look in detail. Then comes what one might describe as the advertisement provision of this part of Sch 2 contained in para 6. Paragraph 6 provides:

'(1) At any time in March in the year in which . . . an application is made, the applicant shall cause notice of the making of the application to be published by means of an advertisement in a newspaper circulating in the licensing authority's area.

'(2) A notice published in pursuance of this paragraph shall specify the name of the applicant, the name of the club and the location of the relevant premises, shall indicate whether the application is for a bingo club licence . . . and shall state that any person who desires to object to the grant of the licence should send to the clerk to the licensing authority, before 15th April, two copies of a brief statement in writing of the grounds of his objection . . .

'(4) A notice published or displayed under this paragraph shall not include any matter which is not required by the preceding provisions of this paragraph to be included in it.'

To understand how the difficulty arose in this case, it is convenient to refer to the form of application which has been prescribed pursuant to para 5 (2) of Sch 2. I need not go through it in detail, but it is a comprehensive document stating the name and address of the applicants, dealing in some detail with the means of access to the premises, describing the premises, stating the purposes for which it is proposed that they should be used, dealing with the hours during which gaming is to take place, and containing the name and address of directors and secretary of the applicant company, in the case of a company. The relevance of my reference is that when that form had been quite correctly used by these applicants in making their application for licensing authority, by a mischance exactly the same form was used when the notice was composed to be inserted in a newspaper pursuant to para 6 of Sch 2. We have a copy of the notice before us. It is printed in bold type at the top, 'To: THE CLERK TO THE GAMING LICENSING COMMITTEE FOR THE CITY OF LEICESTER', and then proceeds to set out verbatim the form of the application made to the gaming committee. There is an addendum at the end clearly intended to comply with one requirement of para 6 (2) of Sch 2 where it is stated that:

'Any person who desires to object to the granting of this licence should send to the clerk to the licensing committee at Town Hall, Leicester, before the 15th day of April next, two copies of a brief statement in writing of the grounds of his objection.'

Although the notice contained that and other requirements of para 6 (2), it is quite evident that it contained a great deal of matter which is not required by that subparagraph to be inserted in it. I can summarise the matter by saying, I think there is no doubt about it, that by a mischance or error the notice published in the paper was not a notice of the making of the application containing the particulars required by para 6 (2), but a copy of the application itself containing inevitably a great deal of additional and unauthorised material. The justices, when that matter was drawn to their attention, took the view that the notice was not a valid notice under para 6 of Sch 2 and that in the absence of a valid notice they had no jurisdiction to hear and determine the matter. The question for us is whether the committee took a proper view in law of the situation before them.

Counsel for the applicants, who has argued this case if I may say so with clarity and great helpfulness to the court, centres his argument on this proposition. Section 42 of the Act prohibits advertisement, but sanctions advertisements so far as they are necessary under the terms of Sch 2. He submits that the purpose of para 6 (4) of Sch 2 is merely to define the matter which can legitimately be put in the notice under that paragraph and thus to restrict the scope for advertising which, as it were, by a side wind the notice inevitably gives to the applicant. Accordingly he says that we should take the view that breach of para 6 (4), although it involves a criminal offence under s 42 because it means that an unauthorised advertisement has been published, yet in his submission it should not invalidate the notice itself if the notice contains the necessary matter under s 6 (2), and no person is likely to be misled by the fact that it contains additional information. There is no direct authority on this point, but I get considerable assistance from the decision of this court in *R v Pontypool Gaming Licensing Committee, ex parte Risca Cinemas Ltd* (1). This was a case where there had been failure to comply with what might be called a time provision of Sch 2. It arose in fact under a different part of the schedule notably that contained in paras 8 to 11, and under those paragraphs an applicant for a licence was required to send to the licensing committee within seven days of the publication of his notice in a newspaper, a copy of the newspaper. In fact, again no doubt by mischance, the licensing committee in that case were not supplied with a copy of the newspaper at all, but only a cutting from it, and perhaps worse, received that cutting not within seven days of the publication of the paper but after 13 days.

It was argued in this court that the court should regard the provision as to time as directory only and not mandatory, and should hold that the application was not rendered ineffective by reason of that failure to comply with the rules. The court refused to do that, and MEGAW LJ, in giving the leading judgment, with which the other members of the court agreed, referred to a dictum of GROVE J in *Barker v Palmer* (2) where he said:

'It is impossible for the court to speculate upon the reasons for legislation in the way suggested, or to dissect an Act of Parliament and say upon those reasons that part of an enactment is directory and part obligatory.'

I feel that if we acceded to the submission of counsel for the applicants in this case we should be speculating on the reasons for legislation and dissecting the schedule in the way discouraged by GROVE J in that dictum. The court in the *Pontypool* case (1) further went on to refer to the somewhat similar provisions of the Licensing Act 1964 dealing with liquor licences, and pointed out that under that Act there is what is sometimes called a dispensing provision whereby a failure to adhere strictly to time limits might be excused in the discretion of the justice hearing the application.

There is no such dispensing provision in the 1968 Act, and the court in the *Pontypool* case pointed out that the procedural code comprised in paras 8 to 11 of the schedule contained no such dispensing power and is to be regarded as a code in itself. I think those observations apply equally to the paragraphs in the schedule with which we are concerned, notably paras 5 to 7. Those paragraphs do contain a complete code; they contain a code written in the most precise and positive language. Anyone who takes the Act in front of him and reads the code carefully is minutely and specifically and precisely directed as to what he has to do. I think that we should take the view, underlying the decision of this court in the *Pontypool* case, that such a code is intended to be strictly enforced, and that a departure from the code *prima facie* renders a step in the procedure in which the error is made an ineffective step. I can see no

(1) 134 JP 648; [1970] 3 All ER 241.

(2) (1881), 8 QBD 9.

justification for taking a different view in the present case, and I am not disposed to follow counsel for the applicants in his submission that the only purpose of para 6 (4) is to enable a prosecution to follow if an over-elaborate notice is given under para 6 (2). I think that Parliament intended this code to be strictly enforced, and I think it should be strictly enforced and I would accordingly refuse this application.

**ASHWORTH J:** I agree, I would only add to reinforce the reasons given by LORD WIDGERY CJ, with which I agree, that under the Licensing Act 1964, to which we were referred, provision is also made for the advertisement of an application, to be found in Sch 2, para 1 (c) (ii). What is in my view striking about comparison of that Act with the Gaming Act 1968 is that under the Licensing Act 1964 there is no prohibition whatever in the Schedule as to the contents of the advertisement or as to what may not appear in it. I ask myself for what reason, therefore, was Sch 2, para 6 (4) to the Gaming Act 1968 inserted, if it were not to make quite sure that the necessary notice was limited to what was laid down in para 6 (2). I can see no other logic in it and to give effect to the argument of counsel for the applicants would really be to render para 6 (4) nugatory. I agree with the result.

**SWANWICK J:** I agree for all the reasons given.

*Application refused.*

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk.*

T.R.F.B.

### COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND CAIRNS LJ, AND MACKENNA J)

18th, 27th May 1971

R v EASOM

*Criminal Law—Theft—Intention permanently to deprive owner of property—Conditional intention insufficient—Intent to deprive owner of such property as on examination proved worth taking—Handbag—Taking by defendant—Handbag and contents intact left ready to be re-possessed by owner—Direction to jury—Theft Act 1968, s 1 (1).*

In every case of theft the appropriation must be accompanied by the intention of permanently depriving the owner of his property. A conditional intention will not suffice. If the appropriator has it in mind merely to deprive the owner of such of his property as, on examination, proves worth taking, and then, having discovered that all the property taken is valueless to him, leaves it ready to hand to be repossessed by the owner, he is not guilty of theft, nor can there be a valid conviction of attempted theft unless it is established that the appropriator was animated by the same intention permanently to deprive the owner as would be necessary to establish the full offence.

In a cinema a woman who occupied a seat immediately in front of the appellant placed her handbag containing various articles on the floor beside her. When the lights went out, the appellant picked up the handbag and examined its contents. He then left his seat, leaving the handbag with its contents intact on the floor in front of him. He was indicted for stealing the handbag and its contents, which were enumerated in the particulars of offences, contrary to s. 1 (1) of the Theft Act 1968. At the trial the jury were directed that it was open to them to convict of stealing the contents of the handbag if the appellant had taken the bag, not knowing what the contents were, but intending to keep such as proved to be of value to him.

**HELD:** the jury had been misdirected, and should have been invited to consider the possibility that the appellant's state of mind was that he intended to appropriate only such articles as might prove to be of value to him and the legal consequences, as stated heretofore, which would flow therefrom; the conviction must, accordingly, be quashed, and a conviction of attempted theft could not be substituted.

**APPEAL** by John Arthur Easom against his conviction at Inner London Quarter Sessions of the theft of a handbag and its contents, he being then sentenced to 18 months' imprisonment, suspended for three years and fined £25.

*F G R Ward* for the appellant.

*F E F Wybrants* for the Crown.

*Cur adv vult*

27th May. **EDMUND DAVIES LJ:** read this judgment of the court. This is an appeal from the conviction of John Arthur Easom at the Inner London Quarter Sessions on 8th October 1970 on an indictment charging him with theft, the particulars of the charge being that on 27th December 1969, he 'stole one handbag, one purse, one note-book, a quantity of tissues, a quantity of cosmetics and one pen, the property of Joyce Crooks'.

The circumstances giving rise to the charge may be shortly stated. On the evening of 27th December 1969 Woman Police Sergeant Crooks and other plain-clothes officers went to the Metropole Cinema in Victoria. She sat in an aisle seat and put her handbag (containing the articles enumerated in the charge) alongside her on the floor. It was attached to her right wrist by a piece of black cotton. Pc Hensman sat next to her on the inside seat. When the house lights came on during an interval, it was seen that the appellant was occupying the aisle seat in the row immediately behind Sergeant Crooks and that the seat next to him was vacant. Within a few minutes of the lights being put out, Sergeant Crooks felt the cotton attached to her wrist tighten. She thereupon gave Pc Hensman a pre-arranged signal. The cotton was again pulled, this time so strongly that she broke it off. Moments later the officers could hear the rustle of tissues and the sound of her handbag being closed. Very shortly afterwards the appellant left his seat and went to the lavatory. The officers then turned round and found Sergeant Crooks's handbag on the floor behind her seat and in front of that which the appellant had vacated. Its contents were intact. When the appellant emerged from the lavatory and seated himself in another part of the cinema he was approached by the police officers. When the offence of theft was put to him, he denied it.

On those facts the appellant was indicted in the manner indicated. Nevertheless, prosecuting counsel, foreseeing certain difficulties even were such facts fully established, told the jury that it was open to them to acquit the accused of theft and to convict him of the attempt. But the learned deputy chairman would have none of this, and in due course directed the jury, '... it cannot be an attempt. It is either stealing or not stealing at all'. When dealing with the matter of intention to deprive Sergeant Crooks permanently of her property, he directed the jury in this way:

'It is said by the defence here that because [the appellant] is charged with stealing a handbag, a purse, a note-book, a quantity of tissues, a quantity of cosmetics and a pen, that he never stole them, because in fact he looked at them and threw them away. But the position is this, and this is where you have got to direct your minds. There is a bag here, of which the person behind does not know the contents, and he takes that bag—if you come to this conclusion—intending permanently to deprive the owner of the contents. That is what he does it for, is it not? He does not know what it is, and do you imagine, if somebody took that and he found a diamond ring, gold cigarette case, or other



valuable property, other than money, that it would not be taken? . . . Did the stealing take place, was it with the intention of whoever was behind permanently to deprive the owner of valuables in there?

The deputy chairman then proceeded to give an illustration of what he intended to convey by that direction. We regretfully have to describe it as more confusing than helpful in that it involved the basic assumption that the asportation there being described was accompanied by an intention to deprive the owner permanently of the object (an envelope) and its unknown contents. In doing so, the deputy chairman in effect directed the jury that, provided they were satisfied on the issue of identity, they *must* convict the accused of the full offence charged, saying:

'Whoever it was behind was intending permanently to deprive [Sergeant Crooks] . . . of the things in her bag. He did not know what it was inside the bag, and in fact . . . really the contents of the bag do not matter specifically for what they are, and you may come to the conclusion—of course it is a matter for you—that whoever it was who did this, was stealing those things; although afterwards he abandoned them . . . But the stealing would then have taken place . . . would it not, and that is a matter for you to decide.'

The only qualification introduced by the deputy chairman was that the jury might conclude 'that there is no question of the stealing of the handbag itself', in which event they were told that they 'would be entitled to bring in a verdict of theft of the other things, and not the handbag' if they thought that 'whoever was behind had committed this particular act, never intending to have the handbag at all, but the contents'.

In the respectful view of this court, the jury were misdirected. In every case of theft the appropriation must be accompanied by the intention of permanently depriving the owner of his property. What may be loosely described as a 'conditional' appropriation will not do. If the appropriator has it in mind merely to deprive the owner of such of his property as, on examination, proves worth taking and then finding that the booty is to him valueless, leaves it ready to hand to be repossessed by the owner, he has not stolen. If a dishonest postal sorter picks up a pile of letters, intending to steal any which are registered, but, on finding that none of them are, replaces them, he has stolen nothing, and this is so notwithstanding the provisions of s 6 (1) of the Theft Act 1968. In the present case the jury were never invited to consider the possibility that such was the appellant's state of mind or the legal consequences flowing therefrom. Yet the facts are strongly indicative that this was exactly how his mind was working, for he left the handbag and its contents entirely intact and to hand once he had carried out his exploration. For this reason we hold that conviction of the full offence of theft cannot stand.

In so concluding, we have not overlooked that counsel for the Crown has, since the trial, altered his view of the case and now shares that expressed by the deputy chairman that the accused should either have been convicted of the full offence charged or acquitted completely. Indeed, he now submits that conviction for the full offence was justified. In support of this changed view we were referred to a passage in Hale's Pleas of the Crown, 1778 edn, vol 1, p 532, which reads:

'So if A without drawing his weapon requires B to deliver his purse, who doth deliver it, and A, finding but two shillings in it gives it to him again, this is a taking by robbery—20 Eliz. Crompt. 34.'

But in our judgment counsel for the Crown seeks to attach excessive weight to this short reference, and the true approach thereto is to be found in Archbold's Criminal Pleading, Evidence and Practice 37th Edn, 1969, para 1469, in the following words:



'Returning the goods . . . can be considered merely as evidence of the defendant's intention when he took them; for if it appears that he took them originally with the intent of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offence.'

So, once more, one is driven back to consider with what intention the appellant embarked on the act of taking. This court in the unreported case of *R v Stark* (1) quashed the conviction for larceny of a man caught in the act of lifting a tool-kit from the boot of a car, the judge having misdirected the jury by telling them:

'Was [the appellant] intending, if he could get away with it, and if it was worthwhile, to take that tool-kit when he lifted it out? If he picked up something, saying "I am sticking to this—if it is worthwhile", then he would be guilty.'

But does it follow from all this that this appellant (as to whose identity and physical acts the verdict establishes that the jury entertained no doubt) has to go scot-free? Can he not, as the counsel for the Crown originally submitted, be convicted at least of attempted theft? Even though the contents of the handbag, when examined, held no allure for him, why was he not as guilty of attempted theft as would be the pickpocket who finds his victim's pocket empty (see *R v Ring, Atkins and Jackson* (2))? Does a conditional intention to steal count for nothing? In his *Criminal Law, The General Part*, 2nd edn, 1961, para 23, Professor Glanville Williams wrote:

'A conditional intention is capable as ranking as legal intention for certain purposes. Thus, it is no defence to an apparent burglar that his intention was merely to steal a certain paper if it should happen to be there.'

He then cited the American Model Penal Code, s 2.02, which provides that:

'When a particular purpose is an element of an offence, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offence.'

But as to this, all (or, at least, much) depends on the manner in which the charge is framed. Thus: 'If you indict a man for stealing your watch, you cannot convict him of attempting to steal your umbrella', per SIR ALEXANDER COCKBURN CJ in *R v M'Pherson* (3), unless, of course, the court of trial has duly exercised the wide powers of amendment conferred by s 5 of the Indictments Act 1915. In our judgment, this remains the law and it is unaffected by the provisions of s 6 of the Criminal Law Act 1967. No amendment was sought or effected in the present case, which accordingly has to be considered in relation to the articles enumerated in the theft charge, and in relation to nothing else. Furthermore, it is implicit in the concept of an attempt that the person acting intends to do the act attempted, so that the mens rea of an attempt is essentially that of the complete crime (see Smith and Hogan, *Criminal Law*). That being so, there could be no valid conviction of the appellant of attempted theft on the present indictment unless it were established that he was animated by the same intention permanently to deprive the police officer of the goods enumerated in the particulars of the charge as would be necessary to establish the full offence. We hope we have already made sufficiently clear why we consider that, in the light

(1) 5th October, 1967, unreported.

(2) (1892), 56 JP 552.

(3) (1857), 21 JP 325, Dears & B 197.

of the evidence and of the direction given, it is impossible to uphold the verdict that such an intention was established in this case.

For these reasons, we are compelled to allow the appeal and quash the conviction.

*Conviction quashed.*

Solicitors: *Registrar of Criminal Appeals; Solicitor, Metropolitan Police.*

T.R.F.B.

### HOUSE OF LORDS

(LORD DONOVAN, VISCOUNT DILHORNE, LORD PEARSON, LORD DIPLOCK AND LORD CROSS OF CHELSEA)

29th May, 30th June 1971

#### LAWRENCE v COMMISSIONERS OF POLICE FOR THE METROPOLIS

*Criminal Law—Theft—Ingredients of offence—Consent by owner to appropriation of property—'Belonging to another'—Theft Act 1968, s 1 (1), 5 (1), 15 (1).*

The words 'without the consent of the owner' which appeared in the definition of larceny in s 1 (1) of the Larceny Act 1916, and are omitted from s 1 (1) of the Theft Act 1968, are not to be read into the latter section. The omission was deliberate, and by it Parliament relieved the prosecution of the burden of establishing that the taking of the property alleged to have been stolen was without the owner's consent.

The offence created by s 1 involves four elements (i) a dishonest (ii) appropriation (iii) of property belong to another (iv) with the intention of permanently depriving the owner of it. Belief or absence of belief that the owner had, with full knowledge of the circumstances, consented to the appropriation is relevant to the issue of dishonesty, not to the question whether or not there has been an appropriation. The words 'belonging to another' in s 1 (1) and s 15 (1) of the Act of 1968 signify no more than that, at the time of the appropriation or obtaining, the property belonged to a person who had possession or control of it or had a proprietary interest in it within s 5 (1) of the Act of 1968.

APPEAL by Alan Lawrence against an order of the Court of Appeal reported p. 144, ante, dismissing an appeal at Inner London Quarter Sessions against his conviction for theft, contrary to the Theft Act 1968, s 1 (1).

*P Back QC and J R P Penry for the appellant.*

*H J Leonard QC and D W T Price for the respondent.*

Their Lordships took time for consideration.

30th June. The following opinions were delivered.

**LORD DONOVAN:** I have had the advantage of reading the opinion of my noble and learned friend, VISCOUNT DILHORNE. I agree with it, and would, therefore, dismiss this appeal.

**VISCOUNT DILHORNE:** The appellant was convicted on 2nd December 1969 of theft contrary to s 1 (1) of the Theft Act 1968. On 1st September 1969 a Mr Occhi, an Italian who spoke little English, arrived at Victoria Station on his first visit to this country. He went up to a taxi driver, the appellant, and showed him a piece of paper on which an address in Ladbroke Grove was written. The appellant said that it was very far and very expensive. Mr Occhi got into the taxi, took £1 out of his wallet and gave it to the appellant who then, the wallet being still open,

took a further £6 out of it. He then drove Mr Occhi to Ladbroke Grove. The correct lawful fare for the journey was in the region of 10s 6d. The appellant was charged with and convicted of the theft of the £6.

In cross-examination Mr Occhi, when asked whether he had consented to money being taken, said that he had 'permitted'. He gave evidence through an interpreter and it does not appear that he was asked to explain what he meant by the use of that word. He had not objected when the £6 were taken. He had not asked for the return of any of it. It may well be that when he used the word 'permitted', he meant no more than that he had allowed the money to be taken. It certainly was not established at the trial that he had agreed to pay to the appellant a sum far in excess of the legal fare for the journey and so had consented to the acquisition by the appellant of the £6.

The main contention of the appellant in this House and in the Court of Appeal was that Mr Occhi had consented to the taking of the £6, and that, consequently, his conviction could not stand. In my opinion, the facts of this case to which I have referred fall far short of establishing that Mr Occhi had so consented.

Prior to the passage of the Theft Act 1968, which made radical changes in and greatly simplified the law relating to theft and some other offences, it was necessary to prove that the property alleged to have been stolen was taken 'without the consent of the owner' (Larceny Act 1916, s 1 (1)).

These words are not included in s 1 (1) of the Theft Act 1968, but the appellant contended that the subsection should be construed as if they were, as if they appeared after the word 'appropriates'. Section 1 (1) provides:

'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.'

I see no ground for concluding that the omission of the words 'without the consent of the owner' was inadvertent and not deliberate, and to read the subsection as if they were included is, in my opinion, wholly unwarranted. Parliament by the omission of these words has relieved the prosecution of the burden of establishing that the taking was without the owner's consent. That is no longer an ingredient of the offence.

MEGAW LJ, delivering the judgment of the Court of Appeal, said that the offence created by s 1 (1) involved four elements: '(i) a dishonest (ii) appropriation (iii) of property belonging to another (iv) with the intention of permanently depriving the owner of it.' I agree. That there was appropriation in this case is clear. Section 3 (1) states that any assumption by a person of the rights of an owner amounts to an appropriation. Here there was clearly such an assumption. That an appropriation was dishonest may be proved in a number of ways. In this case it was not contended that the appellant had not acted dishonestly. Section 2 (1) provides, *inter alia*, that a person's appropriation of property belonging to another is not to be regarded as dishonest if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it. *A fortiori*, a person is not to be regarded as acting dishonestly if he appropriates another's property believing that with full knowledge of the circumstances that other person has in fact agreed to the appropriation. The appellant, if he believed that Mr Occhi, knowing that £7 was far in excess of the legal fare, had nevertheless agreed to pay him that sum, could not be said to have acted dishonestly in taking it. When MEGAW LJ said that, if there was true consent, the essential element of dishonesty was not established, I understand him to have meant this. Belief or the absence of belief that the owner had with such knowledge consented to the appropriation is relevant to the issue of dishonesty, not to the question whether or not there has been an

<b>CRIMINAL LAW</b> – Theft – Ingredients of offence – Consent by owner to appropriation of property – ‘Belonging to another’ – Theft Act 1968, s 1 (1), 5 (1), 15 (1). <i>Lawrence v Commissioners of Police for the Metropolis</i> .. .. .	HL	481
<b>CRIMINAL LAW</b> – Theft – Intention permanently to deprive another of property – Direction to injury – Theft Act, 1968, s 1 (1), s 6. <i>R v Warner</i> .. .. .	CA	199
<b>CRIMINAL LAW</b> – Theft – Intention permanently to deprive owner of property – Conditional intention insufficient – Intent to deprive owner of such property as on examination proved worth taking – Handbag – Taking by defendant – Handbag and contents intact left ready to be re-possessed by owner – Direction to jury – Theft Act 1968, s 1 (1). <i>R v Easom</i> .. .. .	CA	477
<b>CRIMINAL LAW</b> – Theft – Possession or control – No qualification of words in statute – Possession or control in fact sufficient – Removal of car by owner from near garage where left for repairs – Dishonesty – Belief in claim of right – Theft Act 1968 (c 60) s 2 (1), s 5 (1). <i>R v Turner</i> .. .. .	CA	419
<b>CRIMINAL LAW</b> – Vagrancy – Indecent exposure with intent to insult female – Exposure in private room – Vagrancy Act, 1824, s 4, as amended by Criminal Justice Act, 1925, s. 42. <i>Ford v Falcone</i> .. .. .	QBD	451
<b>CRIMINAL LAW</b> – Venue – Indictable offence – Place where defendant ‘in custody’ – ‘Custody’ – Criminal Justice Act, 1925, s 11 (1). <i>R v Kulynycz</i> .. .. .	CA	82
<b>CUSTOMS AND EXCISE</b> – Being knowingly concerned in fraudulent evasion of restriction – Importation of cannabis – Offence and penalty created by Customs and Excise Act, 1952 – Restriction on importation imposed by Dangerous Drugs Act, 1965 – Proceedings on indictment under Customs and Excise Act 1952, s 304 – Need of leave of Attorney-General or Director of Public Prosecutions under s 20 of Dangerous Drugs Act, 1965. <i>R v Williams</i> .. .. .	CA	359
<b>DANGEROUS DRUGS</b> – Occupier permitting premises to be used for smoking cannabis – ‘Permitting’ – Reasonable grounds for suspicion – Failure to take reasonable steps readily available to prevent prohibited act – Dangerous Drugs Act, 1965, s 5 (a). <i>R v Souter</i> .. .. .	CA	458
<b>EDUCATION</b> – Administrative duty of authority – Allocation of pupils to certain schools – Wishes of parents – Complaint to Minister – Education Act, 1944, s 68, s 76. <i>Cumings v Birkenhead Corporation</i> .. .. .	CA	422
<b>EDUCATION</b> – Teacher – Contract of employment – Refusal to obey order – Right of authority to repudiate contract – Non-observance of regulations regarding dismissal and suspension. <i>Gorse v Durham County Council</i> .. .. .	QBD	389
<b>EVIDENCE</b> – Crown privilege – Application to Gaming Board for certificate for consent – Request to board by police on character and reputation of applicant – Letter from police giving information – Alleged criminal libel – Information necessary for proper functioning of board – Overriding public interest for non-disclosure. <i>R v Lewes Justices. Ex parte Gaming Board of Great Britain</i> .. .. .	QBD	442
<b>EXTRADITION</b> – Ireland – Order by magistrate in England – Duty to inquire into merits of charges – Prosecution for political offence if order made – Backing of Warrants (Republic of Ireland) Act, 1965, s 2 (1) (2) (b). <i>Keane v Governor of Brixton Prison</i> .. .. .	HL	40
<b>GAMING</b> – Betting – Office – Advertisement – ‘Premises giving access to a licensed betting office’ – Display of sign on outside wall – Sign showing company’s registered name and containing words ‘turf accountants’ – Indication that premises were licensed betting office – Betting (Licensed Offices) Regulations, 1960, reg 2 – Betting, Gaming and Lotteries Act, 1963, s 10 (5) (a), (b). <i>Maurice Binks (Turf Accountants) Ltd v Huss</i> .. .. .	QBD	148
<b>GAMING</b> – Forecast of future event – Photograph of players taken during football match – Ball not in photograph – Competitors required to mark most likely position of ball – Position later chosen by panel of judges – Success of competitors marking positions closest to that chosen by panel – Betting, Gaming and Lotteries Act, 1963, s 47 (a) (i). <i>Ladbroke (Football) Ltd v Perrett</i> .. .. .	QBD	181
<b>GAMING</b> – Licensing of club – Form of application – Notice advertising making of application – Specific particulars to be included in notice – Notice including specified particulars and additional matter – Validity – Gaming Act, 1968, Sch 2, para 6. <i>R v Leicester Gaming Licensing Committee. Ex parte Shine</i> .. .. .	QBD	473

<b>GAMING</b> – Pool betting – Lottery – ‘Competition for prizes for making forecasts as to sporting events’ – Need of skill in making forecasts – Lottery – Betting, Gaming and Lotteries Act, 1964, s 41, Sched 2, para 13 (a). <i>Singette Ltd and Others v Martin</i> .. .. .	<b>HL</b>	<b>157</b>
<b>GAMING</b> – Registration – ‘Club’ – Refusal to register or renew registration – Members’ clubs only included – Registration not applicable to proprietary clubs – Gaming Act, 1968, Sch 7, para 8. <i>Tehrani v Rostrom</i> .. .. .	<b>QBD</b>	<b>350</b>
<b>HIGHWAY</b> – Gipsy – Encamping without lawful authority or excuse – Meaning of ‘encamp’ – Highways Act, 1959, s 127 (c). <i>Smith v Wood</i> .. .. .	<b>QBD</b>	<b>257</b>
<b>HIGHWAY</b> – Obstruction – Stall for sale of goods – Implied licence by local authority. <i>London Borough of Redbridge v Jaques</i> .. .. .	<b>QBD</b>	<b>98</b>
<b>HOUSING</b> – Compulsory purchase – Clearance area – Adjoining land – Need to show purchase necessary for satisfactory development or use of cleared area – ‘Cleared area’ – Housing Act, 1961, s 43 (2). <i>Coleen Properties Ltd v Minister of Housing and Local Government</i> .. .. .	<b>CA</b>	<b>226</b>
<b>HOUSING</b> – Multiple occupation of premises – Requirements to execute works – Notice – Wilful failure to comply – Defence – Bona fide belief that works better performed later – Housing Act, 1961, s 15 (1) (3) – Housing Act, 1964, s 64 (1). <i>Honig v London Borough of Islington</i> .. .. .	<b>QBD</b>	<b>233</b>
<b>HUSBAND AND WIFE</b> – Maintenance of wife – High Court order registered in magistrates’ court – Application for variation – Substantial expenditure of time – Remission to High Court – Maintenance Orders Act, 1958, s 4 (4). <i>Gsell v Gsell</i> .. .. .	<b>PDA</b>	<b>163</b>
<b>HUSBAND AND WIFE</b> – Matrimonial home and other properties bought in husband’s name with wife’s money – Sums transferred by wife to husband at his request – Imposition of trust on husband. <i>Heseltine v Heseltine</i> .. .. .	<b>CA</b>	<b>214</b>
<b>HUSBAND AND WIFE</b> – Matrimonial home – Separation order obtained by wife – Husband tenant of home – Power of court to exclude husband for limited time – Matrimonial Homes Act, 1967, s 1 (2). <i>Tarr v Tarr</i> .. .. .	<b>CA</b>	<b>222</b>
<b>INFANT</b> – Custody – Order of magistrates – Appeal – Further evidence – Discretion of appellate court. <i>Re B (T A) (an infant)</i> .. .. .	<b>Ch D</b>	<b>7</b>
<b>LOCAL AUTHORITY</b> – Statutory powers – Enforcement – Assurance to company of land with access to and use of authority’s property – Decision by authority to develop property as housing estate – Right to override company’s rights. <i>Dowty Boulton Paul Ltd v Wolverhampton Corporation</i> .. .. .	<b>Ch D</b>	<b>333</b>
<b>LOCAL GOVERNMENT</b> – London – Transfer of land – Land held for two purposes – Vesting in borough council. <i>Greater London Council v London Borough of Croydon</i> .. .. .	<b>Ch. 2</b>	<b>466</b>
<b>LOCAL GOVERNMENT</b> – Merger of council with other councils to form county borough – Loss of employment of clerk and solicitor – Re-settlement and long term compensation – Local Government (Compensation) Regulations, 1963, regs 8, 14 (1) (c) (f). <i>Myrddin-Baker v Teesside County Borough Council</i> .. .. .	<b>QBD</b>	<b>152</b>
<b>MAGISTRATES</b> – Committal to quarter sessions for sentence – Application to change plea of guilty. <i>R v Mutford and Lotherland Justices. Ex parte Harber. R v East Suffolk Quarter Sessions. Ex parte Harber</i> .. .. .	<b>QBD</b>	<b>107</b>
<b>MAGISTRATES</b> – Irish warrant – Endorsement – No inquiry whether prima facie case made out – Habeas corpus – Likelihood of prosecution or detention for political offence – Backing of Warrants (Republic of Ireland) Act, 1965, s 1 (2) (b). <i>R v Brixton Prison Governor. Ex parte Keane</i> .. .. .	<b>QBD</b>	<b>38</b>
<b>MAGISTRATES</b> – Natural justice – Magistrate acting in administrative or executive capacity – Duty to act openly, impartially and fairly – Seizure of sweet potatoes by local authority officer – Meeting between justice and local government officials before hearing – Box of sweet potatoes shown and sample cut open – Retirement at end of hearing of magistrate with public analyst and chief veterinary officer – Advice received, but not communicated to defendants – Food and Drugs Act, 1955, s 9 (3) – Colouring Matter in Food Regulations, 1966, reg 5 (1). <i>R v Birmingham City Justices. Ex parte Chris Foreign Foods (Wholesalers) Ltd</i> .. .. .	<b>QBD</b>	<b>73</b>
<b>PUBLIC ORDER</b> – Public place – Using threatening behaviour – Railway station platform – Public Order Act, 1936, ss 5, 9. <i>Cooper v Shield</i> .. .. .	<b>QBD</b>	<b>434</b>

<b>QUARTER SESSIONS</b> – Appeal – Plea – Change of plea – Enquiry whether plea of guilty at magistrate's court equivocal – Right to remit case to magistrate – Quarter sessions entitled to consider only what happened before magistrate – Nothing in proceedings before magistrate casting doubt on plea. <b>R v Marylebone Magistrate. Ex parte Westminster City Council. R v Inner London Quarter Sessions. Ex parte Westminster City Council</b> .. .. .	<b>QBD</b>	<b>239</b>
<b>QUARTER SESSIONS</b> – Committal for sentence – Gravity of offence apparent from nature of charge – Nothing emerging from facts stated by prosecution to increase gravity of offence – Magistrates' Courts Act, 1952, s 29. <b>R v Tower Bridge Magistrate. Ex parte Osman</b> .. .. .	<b>QBD</b>	<b>427</b>
<b>RACE RELATIONS</b> – Housing – Council houses – Tenants restricted to British subjects – Validity – Action for declarations by local authority – Competency – Race Relations Act, 1968, s 2 (1), s 19 (10). <b>London Borough of Ealing v Race Relations Board</b> .. .. .	<b>QBD</b>	<b>131</b>
<b>RATING</b> – Machinery and plant – Generation of power – Electric motors, hydraulic pumps, and air compressors – Motive power derived from electricity supplied to factory – Hydraulic and pneumatic power distributed throughout factory – Rating and Valuation Act, 1925, s 24 (1), Sched 3 (1) (a) – Plant and Machinery (Rating) Order, 1960, Sched. <b>Chesterfield Tube Co Ltd v Thomas (Valuation Officer)</b> .. .. .	<b>CA</b>	<b>1</b>
<b>RENT CONTROL</b> – Contract referred to tribunal – Entry upon consideration of reference – Papers considered by each member of tribunal individually – Assembly and visit to view premises – No admission obtained – Letter of withdrawal – Not operative till received by tribunal – Rent Act, 1968, s 73 (1). <b>R v Tottenham District Rent Tribunal. Ex parte Fryer Bros (Properties) Ltd</b> ..	<b>QBD</b>	<b>94</b>
<b>ROAD TRAFFIC</b> – Articulated vehicle with trailer – Use for unsuitable purpose – Unsuitability for load on route chosen – Motor Vehicles (Construction and Use) Regulations, 1969 (SI 1969, No 321), reg 76 (3). <b>British Road Services Ltd v Owen</b> .. .. .	<b>QBD</b>	<b>399</b>
<b>ROAD TRAFFIC</b> – Driving test – Duty of examiner appointed by Ministry. <b>British School of Motoring Ltd v Simms and Another, Stafford Third Party</b> ..	<b>Assizes</b>	<b>103</b>
<b>ROAD TRAFFIC</b> – Driving while disqualified – Outstanding offences taken into consideration – Similar offence. <b>R v Jones</b> .. .. .	<b>CA</b>	<b>36</b>
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – Arrest without warrant – Powers of police to detain thereafter – Road Safety Act 1967, ss 1, 2 (2), 2 (4), 3 (1), 4. <b>R v Mackenzie</b> .. .. .	<b>Assizes</b>	<b>26</b>
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – Ascertainment of alcohol proportion – 'Ascertainment from laboratory test' – Drink consumed after cessation of driving – Adjustment of test – Road Safety Act, 1967, s 1 (1). <b>Rowlands v Hamilton</b> .. .. .	<b>HL</b>	<b>241</b>
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion exceeding prescribed limit – Attempting to drive – Car stopped by person wrongly believed by defendant to be police officer – Ignition keys handed over – Departure of defendant from car – Return – Demand for handing back of keys – Refusal – Subsequent breath test – Road Safety Act, 1967, s 1 (1). <b>Harman v Wardrop</b> .. .. .	<b>QBD</b>	<b>255</b>
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion exceeding prescribed limit – Provision of specimen – Blood – Analysis by ordinary equipment and skill – Gas chromatography. <b>Smith v Cole</b> .. .. .	<b>QBD</b>	<b>97</b>
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion exceeding prescribed limit – Specimen for laboratory test – Failure to supply – Reasonable excuse – Excuse relating to blood specimen only – Liability to supply specimen of urine – Direction to jury – Road Safety Act, 1967, s 3 (3) (6). <b>R v Harling</b> .. .. .	<b>CA</b>	<b>29</b>
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion exceeding prescribed limit – Specimen for laboratory test – Hospital patient – Notification to medical practitioner of proposal to make 'requirement' – Failure to include in notification statutory warning of possible consequences of refusal – Road Safety Act, 1967, s 3 (2), (3), (10). <b>R v Knightley</b> .. .. .	<b>QBD</b>	<b>453</b>
<b>ROAD TRAFFIC</b> – Heavy goods vehicle – Driver's licence – Application to licensing authority – Insufficient driving experience of applicant – Refusal – Appeal to justices – 'Person aggrieved' – Power in justices to order authority to grant licence – Road Traffic Act, 1960, s 195 (2), Sched 15, para 1. <b>R v Ipswich Justices. Ex parte Robson</b> .. .. .	<b>QBD</b>	<b>462</b>



<b>ROAD TRAFFIC</b> – Light signals – Fire brigade vehicles – Passing red lights – Order regulating – Validity. <b>Buckoke v Greater London Council</b> .. .. .	CA	321
<b>STATUTE</b> – Construction – Purposive interpretation – Act providing minimum sentences for specified criminal offences. <b>Kennedy v Spratt</b> .. .. .	HL	203
<b>TOWN AND COUNTRY PLANNING</b> – Compulsory purchase – Compensation – Assessment – Application of Pointe Gourde principle to cases under Land Compensation Act, 1961, s 6 (1), Sched 1, part 1. <b>Wilson v Liverpool City Council</b> .. .. .	CA	168
<b>TOWN AND COUNTRY PLANNING</b> – Compulsory purchase – Compensation – Reference to Lands Tribunal – Agreement between parties as to basis of assessment – Subsequent decision of House of Lords that that basis wrong – Power of court to remit case to tribunal – Discretion. <b>Wilson v Liverpool City Council</b> .. .. .	CA	168
<b>TOWN AND COUNTRY PLANNING</b> – Development – Open land used for market trading – Building erected over whole of site – Ground floor area remaining open – Automatic extinction of former use – New planning unit with nil use created. <b>Petticoat Lane Rentals Ltd v Secretary of State for the Environment</b> .. .. .	QBD	410
<b>TOWN AND COUNTRY PLANNING</b> – Enforcement – Notice – Service – “Occupier” – Licensee – Caravan dweller – Town and Country Planning Act, 1962, s 45 (3) (a). <b>Stevens v London Borough of Bromley</b> .. .. .	ChD	380
<b>TOWN AND COUNTRY PLANNING</b> – Permission – Refusal – Appeal to Minister – Decision in accordance with general policy – Need for genuine consideration of particular matter – Town and Country Planning Act, 1962, s 179 (1) (3) (b). <b>H Lavender and Son Ltd v Minister of Housing and Local Government</b> .. .. .	QBD	186
<b>TOWN AND COUNTRY PLANNING</b> – Permission – Refusal – Authority required to purchase land – Compensation – Assessment. <b>Margate Corporation v Devotwill Investments Ltd</b> .. .. .	HL	19
<b>TRADE DESCRIPTIONS</b> – Defence – Act or default of another person – ‘Another person’ – Company – Commission of offence through breach of duty of branch manager – Trade Descriptions Act, 1968, s 11 (2), s 24 (1). <b>Tesco Supermarkets Ltd v Natrass</b> .. .. .	HL	289
<b>TRADE DESCRIPTIONS</b> – Defence – ‘Mistake’ – ‘Act or default’ – Offence due to conduct of employee – Trade Descriptions Act, 1968, s 24 (1) (a). <b>Birkenhead and District Co-operative Society Ltd v Roberts</b> .. .. .	QBD	194
<b>TRADE DESCRIPTIONS</b> – False description – Milk – Foil cap on bottle accurately describing milk and bearing retailer’s name – Names of milk suppliers to whom bottle belonged embossed on bottle – Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1). <b>Donnelly v Rowlands</b> .. .. .	QBD	100
<b>TRADE DESCRIPTIONS</b> – False description – Sale of second-hand car – False number of miles on indicator – Defence – Reliance by defendants on information supplied to them – Act or default of another person – Failure to take all reasonable precautions or exercise all due diligence – Trade Descriptions Act, 1968, s 24 (1) (a), (b), (3). <b>London Borough of Richmond v Motor Sales (Hounslow) Ltd</b> .. .. .	QBD	236
<b>VAGRANCY.</b> See Criminal Law.		

appropriation. That may occur even though the owner has permitted or consented to the property being taken. So proof that Mr Occhi had consented to the appropriation of £6 from his wallet without agreeing to paying a sum in excess of the legal fare does not suffice to show that there was not dishonesty in this case. There was ample evidence that there was.

I now turn to the third element 'property belonging to another'. Counsel for the appellant contended that if Mr Occhi consented to the appellant taking the £6, he consented to the property in the money passing from him to the appellant and that the appellant had not, therefore, appropriated property belonging to another. He argued that the old distinction between the offence of false pretences and larceny had been preserved. I am unable to agree with this. The new offence of obtaining property by deception created by s 15 (1) of the Theft Act 1968 also contains the words 'belonging to another'. 'A person who by any deception dishonestly obtains property belonging to another with the intention of permanently depriving the other of it . . .' commits that offence. 'Belonging to another' in s 1 (1) and in s 15 (1) in my view signifies no more than that, at the time of the appropriation or the obtaining, the property belonged to another with the words 'belonging to another' having the extended meaning given by s 5. The short answer to this contention on behalf of the appellant is that the money in the wallet which he appropriated belonged to another, to Mr Occhi. There was no dispute about the appellant's intention being permanently to deprive Mr Occhi of the money.

The four elements of the offence of theft as defined in the Theft Act 1968 were thus clearly established and, in my view, the Court of Appeal was right to dismiss the appeal. Having done so, they granted a certificate that a point of law of general public importance was involved and granted leave to appeal to this House. Under the Administration of Justice Act 1960, s 1 (1), they have power to grant such leave if they think that a point of law of general public importance is involved and also that the point is one which ought to be considered by this House. The certificate granted does not state that they thought that the point was one which ought to be considered by this House but I infer that they were of that opinion from the fact that leave to appeal was granted.

The first question posed in the certificate was:

'Whether s. 1 (1) of the Theft Act, 1968, is to be construed as though it contained the words "without having the consent of the owner" or words to that effect.'

In my opinion, the answer is clearly No.

The second question was:

'Whether the provisions of s. 14 (1) and of s. 1 (1) of the Theft Act, 1968, are mutually exclusive in the sense that if the facts proved would justify a conviction under s. 15 (1) there cannot lawfully be a conviction under s. 1 (1) on those facts.'

Again, in my opinion, the answer is No. There is nothing in the Act to suggest that they should be regarded as mutually exclusive and it is by no means uncommon for conduct on the part of an accused to render him liable to conviction for more than one offence. Not infrequently there is some overlapping of offences. In some cases the facts may justify a charge under s 1 (1) and also a charge under s 15 (1). On the other hand, there are cases which only come within s 1 (1) and some which are only within s 15 (1). If in this case the appellant had been charged under s 15 (1), he would, I expect, have contended that there was no deception, that he had simply appropriated the money and that he ought to have been charged under s 1 (1). In my view, he was rightly charged under that section.

I must confess to some surprise that a certificate for leave to appeal should have been granted in this case. While it may be true to say that few points of law affecting the general criminal law of the country are not points of general public importance, the second limb of s 1 (1) of the Administration of Justice Act 1960 is one to which great regard should be had, namely, that the point is one which ought to be considered by this House. I can say with some confidence that prior to the Administration of Justice Act 1960, it is most unlikely that the Attorney General's fiat would have been granted for an appeal to this House in a case such as this.

For the reasons I have stated, in my opinion this appeal should be dismissed.

**LORD PEARSON:** I have read the opinion of my noble and learned friend VISCOUNT DILHORNE, and I agree with it; and for the reasons given by him I would dismiss the appeal.

**LORD DIPLOCK:** I agree, for the reasons given by my noble and learned friend, VISCOUNT DILHORNE, that this appeal should be dismissed.

**LORD CROSS OF CHELSEA:** I agree, for the reasons given by my noble and learned friend, VISCOUNT DILHORNE, that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Beach & Beach*; Solicitor to the Metropolitan Police.

G.F.L.B.

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### PROBATE, DIVORCE AND ADMIRALTY DIVISION

(Sir George Baker P and Latey J)

21st April 1971

AGGAS v AGGAS

*Husband and Wife—Summary proceedings—Evidence—Unsworn statement of a party.*

Rule 13 (2) of the Magistrates' Courts Rules, 1968, which provides: 'At the conclusion of the evidence for the prosecution, the accused may address the court, whether or not he afterwards makes an unsworn statement or calls evidence' only applies to criminal proceedings on informations and not to proceedings on a complaint in a matrimonial case."

APPEAL by the wife from an order of Southend-on-Sea justices.

*B S Green* for the wife.

The husband appeared in person.

**SIR GEORGE BAKER P.** By a summons dated 17th September 1970 the wife alleged that the husband had been guilty of cruelty, had deserted her on 19th June 1970, and from that date had wilfully neglected to maintain her and the children. The summons was heard on 19th November 1970 by the justices for the petty sessional division for the county borough of Southend-on-Sea, when they dismissed the complaint. The custody of the two children of the marriage, Julie and Debbie, was given to the wife, and an appropriate order was made for their maintenance.

Counsel for the wife tells us today that he does not pursue the allegation of desertion, but he contends that the justices were wrong in dismissing the allegation of persistent cruelty. This court has come to the conclusion that there must be a re-hearing before a differently constituted Bench of that allegation and of the complaint of wilful neglect to maintain which has not been separately dealt with in this court. The case raises an interesting problem. It is this. The justices have recorded at the end of their notes the words 'Statement by [husband]', and clearly the husband did not go into the witness box to give evidence on oath. The notice of appeal sets out as the first ground of appeal that the justices were wrong in law in permitting the husband to make an unsworn oral statement. It is agreed that, as the husband has told us, he was given the option of going into the witness box or of making an unsworn statement, and not realising what this meant he elected to make an unsworn statement. It seems to me that an unsworn statement to a court is something which can be made only on a criminal information and in the criminal procedure. Rules 13 and 14 of the Magistrates' Courts Rules 1968 distinguish the two procedures. Rule 13 (2) which deals with the order of evidence and speeches on the summary trial of an information provides:

'At the conclusion of the evidence for the prosecution, the accused may address the court, whether or not he afterwards makes an unsworn statement or calls evidence.'

Rule 14 deals with the hearing of a complaint. Rule 14 (2) provides:

'At the conclusion of the evidence for the complainant the defendant may address the court, whether or not he afterwards calls evidence.'

There is therefore the clear distinction that the former specifically allows an unsworn statement; the latter makes no mention of an unsworn statement. In civil actions unsworn statements cannot be received in evidence in the absence of agreement or of statutory provision. For example, the unsworn testimony of a child cannot be admitted in a civil action in the absence of agreement by the parties, and the unsworn statement of an interested party remained excluded by the provisions of s 1 (3) (now repealed) of the Evidence Act 1938. The husband's unsworn statement to the justices apparently consisted in part of denials of the wife's case; it cannot, and should not carry any weight with the court, which is concerned in a matrimonial case with and only with testimony on oath. On that alone a new trial must be ordered.

The less I say the better about the remainder of the case. I would add only this. In addition to recording that the husband elected not to give evidence but to address the court on his own behalf not on oath, the justices have said:

'Although the [husband's] behaviour was not beyond reproach, the allegations made by the complainant in court were not so grave and weighty as to add up to persistent cruelty.'

Then they went on to deal with the allegations about drinking and violence, and they referred to the doctor's evidence, about which there has apparently been a misunderstanding. They continued: 'We heard no evidence of any misbehaviour by the [husband] after this time [i.e. June 1969].' Dealing with the allegation of desertion, they found '(3) ... the [wife] made no specific allegations against him for the last twelve months of their cohabitation ...' It may well be correct that certainly during the requisite six months before the issue of the summons there is no specific allegation of an incident as distinct from allegations of continuing misconduct, as, for example, abuse. It seems to me on reading the notes that there was considerable

evidence of continuing behaviour by the husband which could entitle a court on a view of the whole of the married life to hold that there had been conduct by the husband within the last six months which would certainly call for evidence on oath, from him. I do not want to express a view one way or the other whether the matters alleged over any period of the married life are grave and weighty. Suffice to say that what the wife told the justices, so long as it remained uncontradicted on oath, seems to me to be of such a nature that, if accepted, it was not possible for the justices to reach the conclusions they did. But I emphasise that the husband has not really understood that he must give his evidence on oath and that that evidence and that evidence alone can be weighed in the case against or in conjunction with the evidence of the wife. For these reasons there must be a rehearing.

**LATEY J.** I entirely agree. Rule 13 of the Magistrates' Courts Rules 1968 deals with criminal proceedings, i.e. proceedings on information, and r 14 (2) provides:

'At the conclusion of the evidence for the prosecution, the accused may address the court, whether or not he afterwards makes an unsworn statement or calls evidence.'

Now, it is to be noted that the wording of the rule is 'makes an unsworn statement', not 'gives unsworn evidence'. There is a clear distinction, as Sir George Baker P has said, between an unsworn statement and evidence, i.e. testimony on oath. Rule 14 (2), which deals with proceedings on complaint, is in the same language in its operative parts, except that there is no reference at all to an unsworn statement. It follows in my view (and I entirely agree with Sir George Baker P that there are other pointers established in the law pointing in the same direction) that there is no place in proceedings of the type that we are considering in this case for the making of an unsworn statement. It is quite plain that the justices acted under a misapprehension about the matter, and it also seems plain that it was not explained to the husband that from the point of view of weight, proven weight, it was important for him in an attempt to refute the charges made against him that he should give evidence in the witness box, thus giving an opportunity for that evidence to be tested in cross-examination. I agree that for the reasons fully given by Sir George Baker P there must in this case be a rehearing.

*Case remitted.*

Solicitors: Mervyn Beecham & Bodiam, Southend-on-Sea.

G.F.L.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(SIR JOCELYN SIMON, P, AND BAGNALL, J)

14th January 1971

MAYES v MAYES

*Husband and Wife—Summary proceedings—Procedure—Justices' right to stop case at close of complainant's evidence—Application to matrimonial cases—Right of complainant's advocate to address justices.*

Justices have the right to stop a case at the close of the complainant's evidence either of their own motion or on a submission to that effect. That power arises either as part of the common law or as part of the rules of natural justice and has nothing to do with the provisions of the Magistrates' Courts Rules, 1968. It applies in courts of summary jurisdiction when dealing with matrimonial cases. Where justices exercise that power they must first afford to the complainant's advocate an opportunity to address them and not rely on his asserting his right.

*Husband and Wife—Summary proceedings—Application by complainant for leave to make second speech—Refusal—Matrimonial Causes Rules, 1968, r 14 (5).*

When, in a matrimonial case, justices are faced with an application by a complainant or his or her advocate for leave to make a second speech under r 14 (5) of the Magistrates' Courts Rules, 1968, they should be slow to refuse that leave.

APPEAL by the wife from a decision of Staines and Sunbury justices dismissing her complaint that her husband had deserted her.

D A Smith for the wife.

N B Cockburn for the husband.

**BAGNALL J:** We have before us an appeal on the part of Lillian Ann Mayes, the wife, to which the respondent is her husband, John Mayes, against a decision of the justices of the petty sessional division of Staines and Sunbury given on 27th August 1970, whereby they dismissed the wife's complaint that the husband had on 22nd January 1970 deserted her. The course of the proceedings before the justices was as follows. Mr Burns, as solicitor for the wife, opened her case and then called her as a witness. She gave evidence, was cross-examined, and was examined by the court. At the end of her evidence, as we are informed and accept, the justices intimated that they proposed to retire and they did retire. A short time later the justices took their seats again and intimated in appropriate words—the precise words we do not know—that the wife had failed to make out her case and that they would dismiss the complaint. The justices have given their reasons at the conclusion of which they state:

'We formed the opinion that [the wife's] evidence disclosed no grave and weighty matter which would justify her in leaving the matrimonial home.'

Apart from that they do not record, as indeed there is no reason why they should' the fact that this conclusion was reached by them in the process of, in effect, stopping the case at the end of the wife's evidence. For a reason which will be apparent I do not refer to any part of the rest of the statement of the justices' reasons.

Notice was in due course given of appeal against that decision and four grounds of appeal were stated. I read only grounds (2) and (3) for the same reason as I have given in relation to the justices' reasons.

'(2) That the magistrates were wrong in stopping the hearing at the conclusion of the [wife's] case without calling upon the [husband] to give evidence.



'(3) That the magistrates were wrong in stopping the hearing, as aforesaid, without giving the solicitor for the [wife] the opportunity of addressing them as to whether or not there was a case for the [husband] to answer.'

Counsel for the wife has not sought and, in my view, rightly not sought, to support ground (2), and it is ground (3) on which alone this court has heard argument. Having read that ground, I should for completeness in a recital of the course of the proceedings state that the justices did not call on Mr Burns for the wife to address them before dismissing the case; equally Mr Burns did not request, far less insist, that he should be allowed so to address them.

Counsel for the husband, to whose argument I am greatly indebted both for its attractiveness and its completeness, seeks to support the course adopted by the justices on two grounds. First he says that if one looks at r 14 of the Magistrates' Courts Rules 1968, one finds two provisions relating to the right of an advocate for a complainant to address the court. Rule 14 (1) provides in effect that an advocate for the complainant, before calling his evidence, may address the court. Rule 14 (5) provides:

'Either party may, with the leave of the court, address the court a second time, but where the court grants leave to one party, it shall not refuse leave to the other.'

What counsel for the husband submits, and submits with some force, is that at the highest Mr Burns had a right to ask for leave to address the justices a second time. He did not ask for that leave and so no objection can be taken to the procedure on the ground that he was not afforded an opportunity of so addressing them.

Counsel for the husband's second submission, if that submission be rejected, is that, even if there be a right for an advocate for the complainant to address the court on the occasion and in the circumstances which arose in this case, that is a right which must be asserted at the time, and, if not asserted, must be taken as having been waived, so that again no complaint may be made before an appellate tribunal of the course that was adopted.

It is well settled, so far as actions tried with a jury in the High Court are concerned, that the jury may at any time after the end of the plaintiff's case intimate that they do not wish to hear more, having formed the view that even on his own uncontradicted evidence the plaintiff had failed to make out a case. But, as is apparent from the well-known case of *Hobbs v C T Tinling & Co, Hobbs v Nottingham Journal Ltd* (1), if the jury do so intimate then, before the matter proceeds to verdict and judgment, counsel for the plaintiff must be given an opportunity of addressing the jury. If further support for the view expressed in that case were required, it is, I think, to be found in the more recent case of *Alexander v H Burgoine & Sons Ltd* (2) where, in the course of hearing an appeal from a judge of first instance sitting with a jury on a point which is not necessary for me to refer to in detail, GODDARD LJ said:

'A judge, when the case has been heard, may, and not infrequently does, say to a jury in a case which appears to be perfectly clear: "Gentlemen, do you think it will be of any assistance to you if I sum up, or do you think you can give an opinion at once?" Judges, indeed, have said that to juries in cases such as *MACNAGHTEN, J.*, instances—for example, a libel case where a man is complaining of libel, and after cross-examination has shown that he has no case at all, the judge sometimes turns to the jury and says: "Have you heard enough of this

(1) [1929] 2 KB 1; [1929] All ER Rep 33.

(2) [1939] 4 All ER 568.

case?" although the judge should then be careful to say that the plaintiff's counsel has still the opportunity of addressing them if they wish.'

Perhaps I may be pardoned for anticipating if I say that that case not only supports the conclusion which I have founded on the decision of the Court of Appeal in *Hobbs v C T Tinling & Co Ltd* (1), but also has very considerable materiality to counsel for the husband's second submission.

There is nothing to be found in the Rules of the Supreme Court conferring on the court the right to stop a case at the conclusion of the plaintiff's case, either of its own motion or on a submission to that effect made on behalf of the defendant. In my view, that power of the court is part of the common law, because just as it was long ago held that the settled practice of conveyancers was part of the common law, so, it seems to me, the settled practice of the court must be part of the common law, albeit of adjectival rather than substantive law. The same principle can, I think, be expressed in a different way by saying that this procedure is part of the rules of natural justice which must be applied by all tribunals from the highest to the lowest, in the absence of express statutory or other binding provisions regulating the procedure. That the practice applies in the matrimonial jurisdiction of this Division is apparent from *Jenkinson v Jenkinson* (2). And that the practice applies in courts of summary jurisdiction is equally apparent from *Ramsden v Ramsden* (3). I do not think that it is necessary to read either the facts or any extract from the judgment in that case.

Having regard to the state of the Rules of the Supreme Court and the state of the Magistrates' Courts Rules, 1968, in my judgment the proper conclusion is this. Accepting, as it is accepted on all sides, that justices have the right to stop a case at the close of the complainant's evidence either of their own motion or on a submission to that effect, that power must arise either as part of the common law or as part of the rules of natural justice (to my mind it matters not which) and has nothing to do with the provisions of the Magistrates' Courts Rules 1968. I would, therefore, reject counsel for the husband's first submission that in some way the common law or the rules of natural justice must be put into operation by reference to some spirit to be extracted from the Magistrates' Courts Rules 1968. As to counsel's submission that the Magistrates' Courts Rules 1968 are to be regarded as, in some respects, *sui generis* because, I suppose for historical reasons, they are assimilated to the accusatory procedure adopted in criminal cases, I will say a word in a moment.

I turn then to counsel for the husband's second submission that, by not asserting the right, Mr Burns must be taken to have waived it. If I had had to determine this question apart from authority, I should for my own part and on principle have formed the view that that submission was wrong. It seems to me that, where a court has to act, as all courts have, in accordance with settled practice or rules of natural justice, and that practice or those rules give a person a right to be heard, it must be wrong for the court to proceed to a decision without positively affording that right, and that it would be wrong that the court should proceed relying on the advocate in question to assert his right. It seems to me, though this does not take the matter further, that this must particularly be so in a court where at any rate it is by no means uncommon for both complainants and defendants to appear without benefit of professional advocacy. But I am spared from the burden of resting this conclusion on my own view as to the proper principle to adopt because it seems to me that, if GODDARD LJ and his brethren in the Court of Appeal in *Alexander v H Burgoine & Sons*

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(2) (1963), *The Times*, 15th March.

(3) 118 JP 430; [1954] 2 All ER 623.

'(3) That the magistrates were wrong in stopping the hearing, as aforesaid, without giving the solicitor for the [wife] the opportunity of addressing them as to whether or not there was a case for the [husband] to answer.'

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(3) 118 JP 430; [1954] 2 All ER 623.

*Ltd* (1) had been asked to answer the question based on counsel for the husband's second submission which I have now to answer, they could only have answered it in one way, by rejecting it.

I only wish to make one other observation and it is this. It is perfectly true, as counsel for the husband says, that r 14 of the Magistrates' Courts Rules 1968 bears marked similarity to r 13, which is the corresponding rule relating to proceedings commenced by information of a criminal character. In matrimonial cases, and in particular where infants are involved it is very frequently only a matter of chance which of the spouses appears in court in the position of complainant and which in the position of defendant. It seems to me, therefore, to be highly undesirable that because, for historical reasons, the procedure in courts of summary jurisdiction in matrimonial matters has followed the course of procedure adopted in criminal jurisdiction, that person who happens to be a complainant should be put in the less advantageous position which the criminal practice impose on the prosecutor in its anxiety to do justice to an accused. Though, of course, justices must take the rules as they find them and must observe them to the letter, it seems to me to be desirable to state my view that, when faced in a matrimonial cause—and I wish to make it plain that I say nothing about any other jurisdiction—with an application on the part of a complainant for leave to make a second speech under r 14 (5), justices should be slow to refuse that leave.

Having regard to the view which I have formed on the procedural point, I am of the opinion that the proper course to take in dealing with this appeal is to allow it to the extent of remitting the whole case to be re-heard by the justices in accordance with what I understand to be the invariable practice, that it would be heard by a bench of justices wholly differently constituted from that which was constituted for the original hearing. That being so, and as we have heard no argument on any other point, it seems to me to be wholly undesirable that I should say anything about the merits of the case and I refrain from doing so.

**SIR JOCELYN SIMON P:** I agree entirely with the judgment that BAGNALL J has delivered. I have considerable sympathy with the justices, because the point is not specifically covered by authority. Moreover, since we feel bound to remit for re-hearing, I, like BAGNALL J, think it undesirable to say anything about how the merits of the case strike me, on which, in any case, we have had no argument.

On the important procedural point, it is accepted that it is a rule in the High Court that a case cannot be dismissed at the conclusion of the case for the plaintiff (or petitioner or anyone in that position) without giving that party's advocate an opportunity to address the court. The first question is whether that rule is exclusive to the High Court or extends also to magistrates' courts. Although not dealing specifically with this point, what LORD MERRIMAN P said in *Ramsden v Ramsden* (2) seems to me relevant:

'Although I cannot put my hand on any authority, counsel for the husband is able, from his own experience, to support my recollection and I am prepared to say on my certain knowledge that this court on more than one occasion has laid down, in similar circumstances, that justices, like a judge or a jury, are perfectly entitled to say: "We have had enough of this case, and we do not think anything of it", without being said to have misdirected themselves in law.'

That goes a considerable way to suggest that justices in such a situation are procedurally no different from a judge or a jury. Moreover, in *Hobbs v C T Tinling & Co*

(1) [1939] 4 All ER 568.

(2) 118 JP 430; [1954] 2 All ER 623.

*Ltd, Hobbs v Nottingham Journal Ltd* (1), SCRUTTON LJ, having dealt with the intimations of the jury (that they wished to find for the defendants) and of counsel for the plaintiff (that he 'insisted' on addressing the jury), said: 'It is obvious and elementary that he had such a right, if he thought it worth while to claim it . . .' That again suggests to me that we are concerned with a general rule of judicature. But counsel for the husband says that it is excluded by what one can spell out of the Magistrates' Courts Rules 1968, though he accepts that there is nothing expressly in the rules to limit the principle to the High Court. I think that he is right in saying that the whole spirit of the Magistrates' Courts Rules is designed to secure expedition and economy, but, in my view, such considerations do not impliedly exclude what I regard as a fundamental rule of judicature. It therefore applies to magistrates' courts.

The second question is: Assuming that the advocate had the right to address the court before they came to a final conclusion, should the initiative have come from the court or should the advocate have claimed his right? Counsel for the husband relied on the words which I have just cited from *Hobbs v C T Tinling and Co Ltd* (1): 'It is obvious and elementary that he had such a right, if he thought it worth while to claim it . . .' But SCRUTTON LJ in that passage was dealing with the facts of the case before him and was certainly not addressing his mind to any general principle, still less to the specific point before us today. In my view, the matter is disposed of by *Alexander v H Burgoine & Sons Ltd* (2). Moreover, such a conclusion is consonant with general convenience—it is more conducive to a proper forensic atmosphere that the invitation should come from the court—that the court should say: 'We do not think there is anything in this case [or words to that effect] but do you wish to address us before we come to a conclusion?' That seems to me to be especially a more convenient procedure where the parties may be without representation and, therefore, without any legal knowledge.

That conclusion makes the third question irrelevant, namely, whether, assuming that there is a right to address the court, it can be waived. But I am inclined to think that the general principle is that a rule of natural justice which goes to the very basis of judicature (as I think this does) cannot be waived. One cannot by waiver convert a nullity into a validity.

For those reasons, in addition to those that BAGNALL J has given, I agree that this appeal must be allowed and that there must be a re-hearing.

*Case remitted.*

Solicitors: Owen White & Catlin, Ashford; Horne, Engall & Freeman, Egham.

G.F.L.B.

(1) [1929] KB 1; [1929] All ER Rep 33.

(2) [1939] 4 All ER 568.



HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD GUEST, LORD WILBERFORCE AND LORD SIMON OF GLAISDALE)

3rd, 5th May, 30th June 1971

O'CONNOR AND ANOTHER v A AND B

*Adoption—Consent—Dispensing with consent—Unreasonable withholding of consent—Welfare of child—Powers of appellate court.*

The test whether or not a person is withholding his or her consent to the adoption of an infant unreasonably is an objective one to be made in the light of all the circumstances of the case, some of which may not be within the knowledge of the party refusing consent. Although the welfare of the child is not the sole consideration it is a factor of great importance because a reasonable parent attaches great weight to what is best for his child. On the other hand, although the test is objective, the court is not entitled simply to substitute its own view for that of the natural parent in question. Strong reasons have to be shown for dispensing with consent where the parties are married, wish to have the child, and have suitable accommodation for it.

An appellate court will attach great importance to the opinion of the trial judge in view of his experience in dealing with questions of adoption, particularly where he has interviewed any of the parties, but the appellate court are well entitled to come to a contrary conclusion if they think he is plainly wrong.

APPEAL by the appellants against an interlocutor of the First Division of the Court of Session affirming an interlocutor of the sheriff-substitute of Perth and Angus at Perth on the hearing of a petition for the adoption of a child presented by the respondents, where the sheriff-substitute dispensed with the consent of the appellants, the parents of the child, to the adoption of the child and made an order for its adoption by the respondents.

*D M Ross QC and R N M MacLean (both of the Scottish bar) for the appellants.  
I C Kirkwood QC and J C Milligan (both of the Scottish bar) for the respondents.*

Their Lordships took time for consideration.

30th June. The following opinions were delivered.

**LORD REID:** I am in general agreement with the speech of my noble and learned friend LORD SIMON OF GLAISDALE, and I shall only add a few observations. First, how should an appeal court approach a case of this kind. Adoption cases depend so much on general impression rather than the ascertainment of particular facts that when the judge at first instance has seen the parties an appeal court must be slow to reverse his decision unless he has misdirected himself as to the law or has otherwise clearly gone wrong. In this case there were reports by a curator ad litem and a reporter. That appears to me to be proper procedure. I agree with the LORD PRESIDENT (LORD COOPER) when he said in *J and J v C's Tutor* (1):

'adoption proceedings are sui generis, uniquely devised to effectuate a new statutory institution, and incapable of being forcibly compressed into any of our pre-existing categories of forms of action.'

These reports were carefully and skilfully prepared. A reporter who sees the parties in an informal way has perhaps a better opportunity to form a correct impression

than a judge who sees them for a short time in the unaccustomed atmosphere of a court. So I would attach great weight to their conclusions.

I do not think that the sheriff-substitute misdirected himself as to the law. He cited and followed Scots authorities which appear to me to be in line with the recent decision of this House in *Re W (an infant)* (1). He had to weigh a number of factors in the balance. The test is an objective test—would a reasonable parent have withheld consent? I think that a reasonable parent or, indeed, any other reasonable person, would have in mind the interests or claims of all three parties concerned—the child whose adoption is in question, the natural parents, and the adopting family. No doubt the child's interests come first and in some cases they may be paramount. But I see no reason why the claims of the natural parents should be ignored. If the mother were deeply attached to the child and had only consented in the first place to adoption because of adverse circumstances it would seem to me unjust that on a change of circumstances her affection for the child and her natural claim as a parent should be ignored. And the adopting family cannot be ignored either. If it was the mother's action that brought them in, in the first place, they ought not to be displaced without good reason. So to balance these claims is no easy task. Often no ideal solution is possible. We are dealing largely with future probabilities for the decision once made is irrevocable. So we cannot be certain what will be in the child's best interests in the long run. That seems to me to be an additional reason for giving considerable weight in proper cases to the claims of the natural parents and of the adopting family.

There is one other general observation which I think it right to make. In a case like this I think that a judge is well able to estimate the probable effect of uprooting a child of tender years and transferring it from adopting parents with whom it is happy to its natural parents of whom it has no recollection. In unusual cases medical evidence may be helpful but I should be sorry to see any general tendency to call medical evidence in these cases.

Giving all due weight to the claims of the natural parents in this case I am of opinion that the sheriff-substitute was well entitled to decide it as he did. I would therefore dismiss this appeal.

**LORD MORRIS OF BORTH-Y-GEST:** I have had the advantage of reading in advance the speech prepared by my noble and learned friend, LORD SIMON OF GLAISDALE, and for the reasons which he gives I would dismiss the appeal.

**LORD GUEST:** I refrain from repeating the facts of this case which have been referred to by my noble and learned friend, LORD SIMON OF GLAISDALE, but I content myself with some general observations.

As to the function of an appellate court in adoption petitions. In the present case the sheriff remitted to a reporter to enquire into the circumstances. I say no word of disapproval of such procedure which is an admissible method of investigating the facts in these cases. In this case the sheriff in addition interviewed the natural parents. Here, again, I think this is a perfectly proper course for him to adopt. But this interview was not referred to except by inference in the sheriff's note and we were left in the unhappy position of hearing conflicting statements by counsel as to the date on which and the persons with whom the interview took place. The matter has now been cleared up by the certificate of the sheriff clerk that the sheriff interviewed both natural parents on 21st January 1969. If the judge interviews any party it is desirable that this should be recorded in his judgment.

I am satisfied that this is not the type of case where it can be said that the trial judge has a discretion and that his discretion will not be interfered with except on

(1) p. 259 ante; [1971] 2 All ER 48.

well recognised grounds. It may be that if a formal proof takes place and findings in fact are made by the sheriff-substitute these findings unless altered by the Inner House would be sacrosanct in this House. But where the decision depends on facts ascertained by reporters the matter is, in my view, then at large for the appellate court, subject, however, to this qualification, that the appellate court will attach great importance to the opinion of the trial judge in view of his experience in dealing with questions of adoption, particularly where he has interviewed any of the parties. While, therefore, importance is attached to his decision, the appellate court are well entitled to come to a contrary conclusion if they think he is plainly wrong.

The proper test for the court to apply to the question whether a parent is, under s 5 (1) (b) of the Adoption Act 1958, unreasonably withholding his or her consent to the adoption has been expressed in the recent case of *Re W (an infant)* (1). The judgments of the sheriff and of the First Division, although given before the decision in *Re W*, appear to have anticipated that decision. I can detect no error of law in the sheriff's note. The only criticism which I have to make of his judgment and that of the First Division is that not sufficient importance has been attached to the claims of the natural parents nor to the element of the marriage of the child's parents, albeit at a late stage in the litigation. The first matter was referred to by LORD HAILSHAM OF ST MARYLEBONE LC in *Re W*. This factor when coupled with the marriage of the natural parents is of supreme importance in considering the reasonableness or otherwise of the parents in withholding consent. It has been said more than once that, other things being equal, it is in the best interests of a child to be with its natural parents. No case was referred to in which the consent of the natural parents of a child to an adoption order was dispensed with when the parents had married. The nearest case was where the parents were engaged to be married and in that case their consent was not dispensed with. In my view, therefore, strong reasons have to be shown for dispensing with consent where the parents are married, wish to have the child, and have suitable accommodation for the child.

There are, however, two factors which have persuaded me that despite the strong claim of the natural parents the sheriff's decision should not be interfered with. The first is the instability of both parents as expressed in the report. The father's attitude to the mother and the child has, to say the least of it, been ambivalent, and might be characterised as selfish. The mother's instability is displayed in her change of mind and the uncertainty in her relationship with the father. The prospect of the child's existence in the adopters' house is that of a happy and well-cared for child, as explained in the report of the curator ad litem. The presence of another adopted child in the family of a similar age to this child is a point very much in favour of that household. Against that there is the question mark of the parents' future. I feel that on balance there is a greater risk of the child's future with the parents than with the adopters.

This leads me to the second factor which has persuaded me that the sheriff's judgment should be affirmed. I refer to the disruptive element which must occur in the life of a child now over three years of age by removing him from the home of the adopters who have had him under their care for close on two and a half years to the home of his parents who are really strangers to him. The child has, according to the reporter, become well integrated in the family of the adopters who, as I have already said, had adopted Jacqueline, a child near the age of the adopted child.

These cases are always anxious and the result either way will have heart-rending effects on one party or the other. But when all the circumstances have been considered I am perfectly satisfied that the sheriff arrived at a right decision and that this House should not interfere with it. I would dismiss the appeal.

**LORD WILBERFORCE:** I have had the benefit of reading in advance the opinions of my noble and learned friends, LORD GUEST and LORD SIMON OF GLAISDALE, and I can see no alternative but to agree with their conclusions that the appeal must be dismissed.

The decision is one which I reach with far less than complete satisfaction. For, I believe, the first time, the court is dispensing with the consent of both natural parents of the child, parents who are married to each other and can provide him with an adequate home; the mother's consent to the adoption having been withdrawn so long ago as 29th December 1968, when the child had been with the adopters for only three months. The decision is forced by the inherent difficulty of differing from the judge of fact who decided mainly on a written report—he made no record of an interview he apparently had with the parents—and who seems to have attributed insufficient importance to the *prima facie* interest of a child to be brought up by his natural parents or to the fact of their marriage. Yet, since correct passages from the authorities were recited in the judgment, no manifest error of law can be found, and with the passage of time, almost three years, the difficulty and danger of moving the child have become overwhelming.

One cannot have much satisfaction with the appeal process in these circumstances and if it is to survive some speedier method, with proper interim safeguards, seems certainly to be needed.

**LORD SIMON OF GLAISDALE:** The appellants are the natural parents of the child. They first met in April 1967. The second appellant was then married to his former wife, by whom he had two children. The first appellant was a single woman who had already had two illegitimate children: one had been adopted; the other, Iris, born on 23rd February, 1963, lived with the first appellant. The acquaintance of the appellants apparently soon ripened into an adulterous association, since the child whose adoption is in question must have been conceived in about July 1967. In December 1967 the second appellant established the first appellant in a flat in Dundee, where he lived with her. In March 1968, shortly before the child was due to be born, the second appellant left the first appellant and returned to his own family, elsewhere in Dundee. On 7th April 1968, the child was born to the first appellant at a nursing home in Dundee, which caters largely for the confinement of unmarried women, many of the children born there being adopted. While she was still in the nursing home the first appellant herself made enquiries with a view to the adoption of the child. But, in the upshot, when the first appellant left the nursing home in about May 1968, she took the child with her back to the flat, where she lived again with the second appellant, who had again left his own family. They lived there together from about May until about July 1968, when the second appellant again left the first appellant (and the child) and again returned to his family; he had apparently been finding it difficult to support two families. At about the end of July 1968 the first appellant delivered the child to the second appellant, stating that he was the latter's responsibility. The second appellant, having himself no means of caring for the child, delivered him to the care of the Dundee welfare authorities, who in turn placed him with foster parents. Early in August 1968 the first appellant asked a registered adoption society (see Adoption Act 1958, s 29) to arrange for the child's adoption. Towards the end of September 1968 the second appellant left his family again; though this time he did not return to the first appellant but left Dundee for the South.

On 27th September 1968 the adoption society placed the child with the respondents with a view to their adoption of him. Under the statutory procedures for adoption a number of formalities, by way of safeguards for the child in question, have to be carried out, including a three months' 'probationary period' for the purpose of testing

the suitability of the proposed adopters: see Adoption Act, 1958, s 3. The respondents had been married in 1961; and after they had been childless for five years it was ascertained that their marriage could not be naturally fruitful. In consequence in 1966 they adopted a child, Jacqueline, born in that year. This adoption proved successful; and the respondents now desired to adopt a further child in order to balance the family. The proposed new adoption was approved on behalf of the local authority: see Adoption Act 1958, s 28 (2). The respondents, in their application for adoption, and ever since, have availed themselves of their right that their identity should not be disclosed to any person whose consent to the adoption is required (see Adoption Act 1958, s 4 (2) and Act of Sederunt (Adoption of Children) 1959, para 4): hence the title of this suit.

The three months' 'probationary period' having expired, on 27th December 1968 the respondents presented their formal petition for the adoption of the child. On 29th December 1968 the first appellant by letter withdrew her consent to the proposed adoption. On 10th January 1969 a curator ad litem was appointed for the child. On 21st January 1969 the sheriff-substitute in chambers interviewed the first and second appellants both together, although this was not noted in the interlocutor of that date, and the second appellant had no locus standi, since he was not a 'parent' in the eyes of the law (*A v B* (1)). Answers to the petition and replies thereto having been filed, on 28th February 1969 the sheriff-substitute remitted to a solicitor to report on the circumstances set out in the various pleadings. I shall call him 'the reporter'. The procedure has the sanction of *A v B* where an applicant for adoption wishes to preserve anonymity (see also *X v Y* (2)). On 13th February 1969 the second appellant's wife started divorce proceedings against the second appellant, and on 29th March 1969 she was granted a decree of divorce from him.

Some time between March and May 1969 the curator ad litem made his report to the court. It was favourable to the respondents. It noted that they alleged that when the infant was first received into their home he was in a highly nervous state, continuing:

I believe the cause of this was the somewhat insecure upbringing which the child had experienced before his placement with [them]... There are certainly no indications at the present time of any nervousness on the part of the infant, in fact he gives the impression of being a healthy, contented little boy who is well integrated into the [respondents'] family... It is obvious that the infant receives a high standard of material care... With the infant being well established in the [respondents'] home and within the wider family circle one feels he would have the benefit of a stable and affectionate upbringing if an Adoption Order were made and I would recommend accordingly.'

On 28th May 1969 the reporter made his first report. He thought the respondents' environment was, from the point of view of material comfort and prospects, far superior to that of the first appellant. He was most unfavourably impressed by the arrangements which the first appellant had made for the care of her daughter, Iris, while she was herself at work; although he reported, nevertheless, that Iris seemed happy, clean and contented. He asked the first appellant why she had signed the consent to adoption at a time when the second appellant had finally broken with his wife and had come to stay with her. Her reason, as given to the reporter, was that she could not trust the second appellant, as he had let her down twice before. She told the reporter that 'she could never know where she was with [the second appellant]'. The reporter continued:

(1) 1955 SC 378.

(2) 1967 ScLT 87.



'Some time later when [the first appellant] and [the second appellant] were visiting [the second appellant's] family the question of Michael was brought up by [the second appellant's] family and it was at this stage that [the first appellant] decided to withdraw her consent to the Adoption . . . It seems to me that to a very large extent, the pressure for the return of Michael comes from his putative father, [the second appellant], and possibly his family. [The first appellant] seems to me not entirely to share [the second appellant's] wishes so wholeheartedly.'

The report concludes:

'Neither [the first appellant] nor [the second appellant] seem to me to be particularly stable individuals, at least as shown by their history of relationships with one another and with others.'

On 31st May 1969 the appellants married each other. The child thereby became legitimated (Legitimation (Scotland) Act 1968, s 1); and the second appellant then first became his 'parent' whose consent to adoption was required for the purpose of the Adoption Act (see *A v B* (1)). In August 1969 the second appellant re-registered the birth of the child so as to show himself as the father. (At the original registration of 29th April 1968, the first appellant had been the informant; and since the second appellant had not joined in the registration his name could not be shown as the father of the child.)

In the meantime, on 10th June 1969, the sheriff-substitute, having ascertained that the appellants were married, appointed intimation of the adoption petition on the second appellant and allowed him, if so advised, to sist himself as a party to the proceedings. In further view of the change of circumstances, the sheriff-substitute also remitted of new to the reporter to make fresh enquiries. Though no doubt this gave the reporter a further opportunity of assessing the personalities of the appellants the second report of the reporter, dated 22nd July 1969, adds little. The first appellant had stopped work for health reasons. It appeared that the second appellant was a non-practising Roman Catholic, while the first appellant was 'nominally a Protestant'; but the children would be brought up as protestants, and the second appellant did not contemplate any interference either from his church or his family.

On 4th November 1969 the sheriff-substitute heard the agents for the various parties on the petition and the objections thereto. He did not have proof, presumably in order to safeguard the respondents' anonymity; apparently by consent, he proceeded on the basis of the report by the curator ad litem and the two reports of the reporter to whom the remit had been made. On 20th January 1970 the sheriff-substitute made his interlocutor dispensing with the appellants' consents and an adoption order in favour of the respondents. On 27th January 1970 the appellants appealed against the interlocutor of 20th January 1970; and on 1st and 2nd December 1970 the hearing took place before the First Division. On 11th December 1970 the First Division unanimously refused the appeal, affirming the interlocutor of 20th January 1970 and the adoption order of that date. 'The appellants now appeal to your Lordships' House.

The appeal turns on ss 4 and 5 of the Adoption Act 1958. The relevant provisions read as follows:

'4 (1) Subject to s 5 of this Act, an adoption order shall not be made—(a) in any case, except with the consent of every person who is a parent . . . of the infant . . .



'5 (1) The court may dispense with any consent required by para (a) of subs (1) of s 4 of this Act if it is satisfied that the person whose consent is to be dispensed with ... (b) ... is withholding his consent unreasonably.'

The upbringing of its members until they are in a position to assume independent membership must be the concern of any society. Nevertheless, for a number of reasons, societies generally delegate the main responsibility for the upbringing of their infant members to the natural parents. Hence arises a reciprocal primary right in the natural parents to bring up their own child. The right of the child to be decently brought up to adult membership of the society needs no analysis or expatiation. But there will be some natural parents who do not wish to enjoy the rights, with their concomitant obligations, of bringing up their natural child—indeed, wish to surrender such rights and obligations. On the other hand, there will be people who for various reasons, will wish to enjoy such rights and assume such obligations in respect of a child who is not their natural child. Adoption is the procedure whereby the two classes of adults—those who wish to surrender their rights and obligations in respect of a child and those who wish to assume them—are brought together, so that the latter are legally substituted for the former in relation to the child in question. The legal metamorphosis finds its quintessential expression in s 13 (1) of the Adoption Act 1958 whereby:

'Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents ... of the infant in relation to the future custody, maintenance and education of the infant ... shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid (and, in Scotland, in respect of the liability of a child to maintain his parents) the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.'

The volunteers to perform a social duty primarily imposed on others who are unwilling themselves to perform such duty acquire thereby a right to be considered; and once they actually enter on the performance of responsibilities towards the child acquire thereby a further right to be considered.

The rights and interests of the persons principally concerned—the natural parents, the infant and the proposed adopters—are brought into just balance by the construction which the courts have put on s 5 (1) (b) of the 1958 Act. This has recently been reviewed in your Lordships' House in *Re W (an infant)* (1). The test whether the refusal to give consent is unreasonable is an objective one to be made in the light of all the circumstances of the case (some of which may not be within the knowledge of the party refusing consent). Although the welfare of the child is not the sole consideration it is a factor of great importance, because a reasonable parent attaches great weight to what is best for his child. On the other hand, although the test is objective, the court is not entitled simply to substitute its own view for that of the natural parent in question. As LORD HALSHAM OF ST MARLYBONE LC, said in *Re W (an infant)*:

'Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. The question in any given case is whether a parental veto comes within the band of possible reasonable decisions and not whether it is right or mistaken. Not every reasonable exercise of judgment is right, and not every mistaken exercise

(1) p. 259 ante; [1971] All ER 48.

of judgment is unreasonable. There is a band of decisions within which no court should seek to replace the individual's judgment with his own.'

The primacy of the natural parent's right is thus vindicated.

In the First Division it appears that the main argument in law on behalf of the appellants was based on certain dicta to the effect that a parent cannot be acting unreasonably within the meaning of s 5 (1) (b) of the 1958 Act unless there is some element of culpability or of reprehensible conduct in his decision to withhold consent. This argument was rejected by the First Division; and, since it was also the argument which was rejected in *Re W (an infant)* (1) it was not maintained before your Lordships. But it was argued that the sheriff-substitute had still misdirected himself in law. In two passages in the note which he appended to his interlocutor of 20th January 1970, he posed the question how a 'responsible parent' would behave in the circumstances; and in another passage he wrote of the appellants' 'irresponsible conduct'. It is unnecessary to attempt to analyse what shades of difference there are between 'responsible' and 'reasonable', because, reading the note as a whole, I do not think there can be any doubt that the real question that the sheriff-substitute was posing to himself was whether the appellants were withholding their consent unreasonably; he repeatedly referred to this as the test; he cited the passage from the judgment of LORD DENNING MR in *Re L (An Infant)* (2) which was approved in *Re W (an infant)*; and he specifically directed himself that the question was to be answered by looking at the matter through the parents' eyes, though objectively and in knowledge of all the facts, some of which (owing to the respondents' exercise of their right to preserve anonymity) were not within the knowledge of the appellants. I agree with the view of the First Division that there was no error of law in the approach of the sheriff-substitute.

But it is also claimed on behalf of the appellants that the sheriff-substitute could not reasonably on the facts of the instant case have come to the conclusion that the appellants have withheld their consents unreasonably. It is argued that the sheriff-substitute and the First Division, although claiming not to do so, in reality had exclusive regard to what they saw to be the welfare of the child. I do not think that the courts below can be faulted in attaching considerable weight to what would promote the child's welfare; since this is a consideration which would weigh with a reasonable parent. As LORD DONOVAN said in *Re W (an infant)* (1): 'while the welfare of the child is not, as it is in custody proceedings, the paramount consideration, it is inferior in importance to no other.' Welfare is certainly not exclusively, or even primarily, to be considered in a material sense, but extends to all factors which will affect the future of the child. To quote LORD DONOVAN again: 'The exploration of these matters does not make any judgment predominantly a "welfare" judgment in any sense which would invalidate it.'

But it was argued for the appellants that the courts below, in regarding the past conduct of the appellants as evidence that they were unreasonably withholding consent, failed to allow for the fact that the appellants were not then married, that the first appellant was in a position where she was bound to be morally torn, and that the second appellant, too, was subject to a conflict of loyalties; since their marriage the appellants' attitude in this matter has been constant and single-minded: the courts below gave no or no sufficient weight to what was alleged to be the crucial (and possibly unique) feature of the case, namely, that the objectors were the natural parents of the child, living in wedlock and wishing to bring up the child as the legitimate child of their family; and that the withholding of consent in such circumstances was entirely reasonable. I do not think that the sheriff-substitute shut his

(1) p 259 ante; [1971] 2 All ER 48.

(2) (1962), 106 Sol Jo 611.



(The second appellant, of course, had never given his consent.) Expert evidence is not required to tell us that the handing over of the child from a family into which he has been integrated to one of total strangers is likely to be far more disruptive and damaging to him now than it would have been at the end of 1968 or up to the middle of 1969. This consideration should not, in my judgment, preclude your Lordships as an appellate tribunal from allowing the appeal if it were clear that the courts below had proceeded in error—justice to the appellants would demand no less—but I think it should impose some additional caution before interfering with a decision which, granted a correct approach in law, is primarily one of judgment by an instance court of matters of fact and of degree and of the balance of competing claims. There is at the moment a departmental committee charged with general consideration of matters relating to adoption; this aspect of the case—the inevitable change in circumstance pending an appeal—might well claim their attention. I would dismiss the appeal.

*Appeal dismissed.*

Solicitors: Warmingtons & Hasties, for Weir & MacGregor, Edinburgh; Lovell, White & King, for J & R A Robertson, Edinburgh.

G.F.L.B.

# PROBATE, DIVORCE AND ADMIRALTY DIVISION

(SIR JOCELYN SIMON, P, AND BAGNALL, J)

25th January 1971

## BREWSTER v BREWSTER

*Magistrates—Domestic proceedings—Questions to witness—Interest of party—No positive case made by other party—Magistrates' Courts Act, 1952, s 61.*

By s 61 of the Magistrates' Courts Act, 1952: 'Where in any domestic proceedings . . . it appears to a magistrates' court that any party to the proceedings who is not legally represented is unable effectively to examine or cross-examine a witness, the court shall ascertain from that party what are the matters about which the witness may be able to depose or on which the witness ought to be cross-examined . . . and shall put, or cause to be put, to the witness such questions in the interest of that party as may appear to the court to be proper.'

**HELD:** where a party has made no positive case which can be put to the other party magistrates are not required by s 61 to ask any questions to that other party or a witness.

**APPEAL** by the wife against the dismissal by justices for Redditch, Worcestershire, of her complaint that her husband had been guilty of persistent cruelty.

*John Lee* for the wife.

The husband did not appear.

**BAGNALL J:** On 28th May 1969 the wife, Bridget Brewster, preferred a complaint before the petty sessional division of Redditch in the county of Worcester, that her husband, Ronald Aubrey Clive Brewster, on 22nd May 1969 and on divers days prior thereto, had been guilty of persistent cruelty. She prayed an order that she would be no longer bound to cohabit with the husband, an order for the custody of the child of the family, and an order for payment of maintenance. That complaint was heard by the justices on 27th August 1969 and the complaint was dismissed. No order was made in respect of any of the claims preferred. On 29th December 1969 notice

of appeal was filed on behalf of the wife against that decision and the appeal is before this court for hearing today—over 12 months after the date on which the notice of appeal was filed, nearly 18 months after the hearing before the justices and a correspondingly long period after the events which gave rise to the proceedings occurred. I simply state those facts, and particularly the time-table at the end, without further comment, but they do illustrate how, if matters are not prosecuted more diligently than they have been in this case, the usefulness of courts of petty session as tribunals of immediate decision and speedy variation is very much reduced. Nevertheless, on application being made and reading a certificate which, however, only dealt with matters down to the filing of the notice of appeal, this court gave leave to the appellant to appeal out of time.

The course which the hearing before the justices took was this. The wife appeared by a solicitor and gave evidence on oath, the notes of which take up about two pages of the copy of the justices' notes which has been supplied to us. Right at the end of that examination-in-chief she deposed that the husband gave her about £18 a week. The only materiality of that at the moment is that it was the only matter to which any question in cross-examination was directed. The husband appeared in person and apparently asked some such question as 'Did I not pay you £20 a week?' to which the answer was 'No', because the note simply reads: 'You have not paid £20 a week'. That was the only question in cross-examination.

A son of the marriage, then aged 24, gave evidence in support of the wife's case and he was apparently asked two questions in cross-examination which elicited answers to the effect that his parents could not seem to 'hit it off' and that the husband was a strict father. The husband did not give evidence on oath but addressed the justices, apparently quite shortly. The notes indicate that he was—apart from a general comment on the wife's attitude to his behaviour—stating facts. There was no evidence on oath in support of the husband's case and apparently neither the wife nor her son was questioned by the justices. The wife's evidence surveyed almost the whole period of a marriage which had subsisted since 15th June 1946, i.e., a period of about 23 years before the hearing of the complaint. She gave evidence of various acts of a violent nature and some of a personally violent nature going back to 1948 or 1949. I need not recite them all. The husband used to throw ornaments about; he said he would kill the son of the marriage—then about nine or ten; the husband hit him with a heavy leather belt. The wife said that she was always frightened of the husband because he was unable to control himself. He was apparently cruel to a pet dog in a manner which distressed her. In 1967, after the wife had an operation on a thyroid gland, the husband tried to strangle her and put his two arms around her throat. The same year he threw a coal bucket, I suppose at the wife, but it is not particularised. He threw a garden fork at the wife. In 1968 he threw a spade at the wife, which hit her foot. Then I come to the evidence of the period which begins in about November 1968—i.e., during the six months immediately preceding the date of the complaint—and I think I ought to read this:

'All the time he accuses me of going with men. He accuses me of going on the Streets. Early in 1969 he said "Go and get b— pregnant". In May 1969 he threw meals. On 22nd May he said: "I don't want any of that b— liver". He went upstairs. I went out into the garden. When I came back dinner had disappeared. Husband mutters at me all the time. He calls me a yellow belly and like a load of horse muck all over the place. I am in a state of fright all the time.'

I do not think I need trouble with the detail of the son's evidence which substantially, though shortly, corroborated a number of matters in the wife's evidence.

The justices dismissed the earlier incidents, to some of which I have referred as having happened 20 years ago in one case and rather less time ago in the others, as having been, as they put it, 'too remote'. After considering the more recent allegations, the evidence of which I have read, they said this:

'Having observed the [wife] in the witness box, and having seen the [husband], we were of the opinion that these incidents were grossly exaggerated and, while something akin to the [wife's] version may have happened, the facts were not as serious as she made out, and in any event—they took place more than a year prior to the matter coming to court—during which time the parties had continued to live together.'

I pause to observe that that paragraph seems to me to combine a rejection of the wife's evidence factually, apparently holding that, if the incidents did happen, they did not amount to cruelty or persistent cruelty, with the superaddition of a finding of what I can only describe as a defence of quasi-condonation. It is not easy to extricate the true reasons why the justices took the course which they did take.

I shall return to that in a moment but I must first say a word about the first ground on which this appeal is based. I should, I think, read the ground in full:

'The justices failed to try the case properly or in accordance with their duty under s 61 of the Magistrates' Courts Act 1952, in that they allowed the [wife's] evidence to be given without any material questions being asked of her by way of cross-examination, either by or on behalf of the [husband] or by or through the court.'

Section 61 is in these terms:

'Where in any domestic proceedings... it appears to a magistrates' court that any party to the proceedings who is not legally represented is unable effectively to examine or cross-examine a witness, the court shall ascertain from that party what are the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, as the case may be, and shall put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper.'

That section seems to me to raise a number of questions, in particular how the justices are to proceed upon the task of determining whether an unrepresented party is able or is unable effectively to examine or cross-examine a witness. I say that because it is plain from the words of the section that its provisions are not invoked simply by reason of the fact that a party may not be represented. But it is at any rate plain that the purpose of the section is to enable questions to be put to witnesses, either in chief or in cross-examination, in the interests of the party that is unrepresented. That this may be a phrase of wide ambit is apparent from *Marjoram v Marjoram* (1) where it was held that the section had been violated because the justices had not by way of cross-examination of a wife put to her, in the technical sense, a letter written by her husband, who was unrepresented, and containing details of a positive case that he was to make before the court. Nothing of that sort arises in the present case because, as is apparent from what I have already said, and from an examination of the full record of the proceedings before the justices, the husband had made no positive case which could be put to the wife. Except in the case of such a technical point and such special circumstances as arose in *Marjoram*, I am of opinion that it is not open to a party to complain to this court that s 61 has not been observed simply because that party

(1) 119 JP 291; [1955] 2 All ER 1.



had not been cross-examined, in the sense of having his or her evidence challenged or disputed by a hostile cross-examination. Indeed, one can foresee very difficult situations arising if, for example, a party in person is sufficiently astute to realise that the best cross-examination of a witness whose evidence is thin and unpersuasive is no cross-examination at all. Such a one would, it seems to me, have a legitimate cause for complaint if the justices, in purported pursuance of their powers under s 61, in effect succeeded in making a case for the witness in question by an injudicious cross-examination. This would indeed be a peril to the unrepresented as compared with the represented which I do not think they ought to bear.

I have reached the clear conclusion that this appeal ought to be allowed and this court ought to remit the complaint to be re-heard, and in accordance with the practice to be re-heard by a Bench of justices differently constituted.

**SIR JOCELYN SIMON P:** I agree with the judgment of BAGNALL J and that this case should be remitted for re-hearing. In view of that, I desire to say nothing whatever about the facts of the case, and certainly nothing that I do say must be taken to be indicating any view as to the likely outcome of the re-hearing—as to which, indeed, I feel I am incapable of expressing any worthwhile view.

As regards s 61 of the Magistrates' Courts Act 1952, I entirely agree with what BAGNALL J has said and I cannot add anything advantageously to what he has said. So too for the point on *Theobald v Theobald* (1). That alone—the fact that it is impossible for us to ascertain how much of the wife's evidence was accepted—makes an order for re-hearing the only possible course for this court to take.

*Case remitted.*

Solicitors: Willmetts & Co, Windsor, for Whiteley & Pickering, Redditch.

G.F.L.B.

(1) 126 JP 377; [1962] 2 All ER 863.

### COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, CJ, WIDGERY, LJ, AND COOKE, J)

25th February 1971

R v HENNIGAN

*Road Traffic—Causing death by dangerous driving—'Cause' of accident—No need to prove substantial or major cause—Road Traffic Act, 1960, s 1.*

On a charge of causing death by dangerous driving it is sufficient for the prosecution to prove that the dangerous driving of the defendant was a cause of the accident and something more than *de minimis*. It is not necessary to prove that it was a substantial or a major cause. If the word 'substantial' is used in a summing-up, it should be taken to indicate to the jury that the dangerous driving, as a cause of the accident, was something more than *de minimis*.

APPEAL by James Hennigan against his conviction at Liverpool Crown Court on two counts of causing death by driving in a manner dangerous to the public contrary to s 1 (1) of the Road Traffic Act 1960.

H K Goddard for the appellant.

M H Feeney for the Crown.

**LORD PARKER CJ** delivered this judgment of the court: In February 1970 at Liverpool Crown Court the appellant was convicted by a majority verdict of ten to two on two counts of causing death by driving in a manner dangerous to the public. He was fined £25 on each count and disqualified for five years and a further six months consecutive under the totting up procedure. He now appeals against conviction on a point of law or mixed law and fact, and in addition applies for leave to appeal against his sentence.

In view of the point that is made, it is unnecessary to go into the facts in full in this case. Quite shortly what happened was that a Mrs Lowe driving a Vauxhall car with two passengers was emerging from a road called Old Road in order to cross the Wigan to Ashton Road and go into Nicol Road opposite. Old Road and Nicol Road were minor roads and there was a 'Give way' sign where Mrs Lowe was approaching. The evidence was that she stopped at the entrance and then moved forward, and her evidence was that she had looked to her left towards Wigan and that the only traffic that she saw was a long way away down by a railway bridge. However, she had only just got astride the middle of the road when a Ford Cortina driven by the appellant from Wigan towards Ashton crashed into her broadside and as a result Mrs Lowe's two passengers were killed.

There was a considerable body of evidence that the appellant was driving at a fast speed; the estimates went up to 80 miles an hour, and almost immediately before the accident he appears to have overtaken a Jaguar, regaining his side of the road and then crashing into Mrs Lowe's car. It at once occurs to one that if this was a civil action, Mrs Lowe might be held substantially to blame, emerging from a minor road, because she clearly was at fault; on the other hand the appellant in a restricted area at night—it was 11.00 pm—was clearly going too fast, and dangerously too fast.

The trouble that has arisen in this case is in regard to a direction that the judge gave when the jury, after retirement, came back and asked a question. In the course of the summing-up he told the jury that it must be shown that the appellant's manner of driving caused the collision and that the collision caused the death. He said this:

'It is admitted by the defence here very properly that the death of both Mr Twiss and Miss Twiss was the result of the collision, so the only issue you have to try is whether it is established, first of all, that the manner of his driving his car was dangerous, and, secondly, if it was, that that dangerous driving on his part was a substantial cause of the collision which is admitted resulted in the death of those two people.'

A little later he said addressing the jury:

'You then say: "If I think it was dangerous was it a substantial cause—not necessarily the whole cause—was it a substantial cause of the collision which caused the death?"'

Then the jury returned for a further direction, and they had probably been considering this from the point of view of blameworthiness as in a civil action. They asked: 'We would like further guidance on what you mean by "substantial", my Lord.' The judge then said:

'"Substantial" means that it is not a remote cause of the death, but it is an appreciable cause of the death. It is rather like this: in a collision between two motor cars there may be both drivers each 50 per cent to blame, and each would be a substantial cause of the collision. If on the other hand you get a situation where you can say that one of the drivers was four-fifths to blame and the other was one-fifth, you can say: "I don't regard one-fifth as being a substantial cause of

the accident; if it is as low as that then the fellow who really caused the accident was the one who is four-fifths to blame". It is hard to define, but it means the real cause as opposed to being a minimal cause. Do you follow me? Would you like to retire again?

Then the foreman, clearly indicating what was in his mind, said: "There is some doubt as to whether we can apportion blame." The trial judge quite rightly said:

"You have only one man before you, and you are not concerned in any civil claim or with compensation. All you have to find is whether [the appellant] in your charge, was guilty of dangerous driving which was a substantial cause of the death of these two people, and I hope I have explained "substantial" to you effectively."

What is said, as the court understands it, is that that conveyed the impression to the jury that they could find the appellant guilty if he was only little more than one-fifth to blame. The court would like to emphasise this, that there is nothing in s 1 of the Road Traffic Act 1960 which requires the manner of the driving to be a substantial cause, or a major cause, or any other description of cause, of the accident. So long as the dangerous driving is a cause and something more than *de minimis*, the statute operates. What has happened in the past is that judges have found it convenient to direct the jury in the form that it must be, as in one case it was put, the substantial cause. That was the case in which Finnemore J gave a direction to the jury, in *R v Curphey* (1). That, in the opinion of this court, clearly went too far, and BRABIN J in a later case of *R v Gould* (2), left it to the jury in the form of a 'substantial cause'.

Although the word does not appear in the statute, it is clearly a convenient word to use to indicate to the jury that it must be something more than *de minimis*, and also to avoid possibly having to go into details of legal causation, remoteness and the like. That appears from the further direction of the trial judge, who in terms said that it must not be remote, and that it must be a real cause as opposed to being a minimal cause. It is perhaps unfortunate that he dealt with the matter in the illustration he gave on the basis of apportioning blame; but when one analyses it, it is quite clear that the direction, if anything, was much too favourable to the appellant in that the court is quite satisfied that even if he was in this case only one-fifth to blame, he was a cause of the death of these two people. In these circumstances the appeal is dismissed.

*Appeal dismissed.*

Solicitors: Elliott & Buckley, Manchester; Edward L Alker & Ball, Wigan.

T.R.F.B.

(1) (1957), 41 Cr App Rep 78.

(2) 127 JP 414; [1963] 2 All ER 847.

PRIVY COUNCIL

(LORD HODSON, LORD DONOVAN AND LORD DIPLOCK)

9th, 10th February, 22nd March 1971

ATTORNEY-GENERAL OF HONG KONG v PAT CHIUK-WAH AND OTHERS

*Criminal Law—Forgery—United Kingdom National Insurance stamp—Valuable security—‘Instrument’—Evidencing payment of money—Interest in public fund—Incomplete document—Forgery Act, 1913, s 1 (3) (b), s 2 (2) (a), s 18 (1).*

*Criminal Law—Forgery—Possession of implements for forgery—Possession of engraved plates—Document evidencing title in public fund—Contingent interest included—United Kingdom National Insurance stamp—Stamp not affixed to card—Offence complete—Forgery Ordinance (Hong Kong), s 2, s 3 (3) (b), s 4 (2) (a), s 11 (c), (d).*

The respondents were charged in Hong Kong with forgery of United Kingdom National Insurance stamps, contrary to s 4 (2) (a) of the Forgery Ordinance of Hong Kong, which corresponded with s 2 (2) (a) of the Forgery Act, 1913. They were also charged with possession of instruments for forgery, contrary to s 11 (d) of the Ordinance, which corresponded with s 9 (d) of the Forgery Act, 1913. The trial judge ruled that the stamps were not ‘valuable securities’ within the meaning of s 2 and s 4 (2) (a) of the Ordinance, which corresponded with s 18 (1) and s 2 (2) (a) of the Act of 1913, nor were they ‘documents ... evidencing the title of any person to any ... interest in any public ... fund ... of Her Majesty’s Dominions’ within the ruling of s 11 (c), (d) of the Ordinance, which corresponded with s 9 (c), (d) of the Act of 1913. The ruling was upheld by the Supreme Court. On appeal by the Attorney-General for Hong Kong to the Privy Council,

**Held:** the appeal must be allowed since a United Kingdom National Insurance stamp fell within the ordinary meaning of ‘valuable security’ in s 4 (2) (a) of the Ordinance (corresponding with s 2 (2) (a) of the Forgery Act, 1913); further, since the expression ‘instrument’ in the context of the Forgery Ordinance was not confined to a formal document, but included any document intended to have some effect, as evidence of, or in connection with, a transaction capable of giving rise to legal rights or obligations, a United Kingdom National Insurance stamp fell within the words ‘any receipt or other instrument evidencing the payment of money’ in the definition of ‘valuable security’ in s 2 of the Ordinance (corresponding with s 18 (1) of the Act of 1913); further, the stamp was an ‘evidencing the title of any person to any share or interest in any public ... fund ... or any part of Her Majesty’s Dominions’, since ‘interest’ in a fund included a contingent interest, and a National Insurance card with stamps affixed to it was evidence of title to a contingent interest, and, although the stamps had not yet been affixed to the cards, by reason of s 3 (3) (b) of the Ordinance corresponding with s 1 (3) (b) of the Act of 1913, the offence of forgery of a document could be complete even if the document when forged was incomplete.

**APPEAL** by the Attorney-General of Hong Kong against an order of the Supreme Court of Hong Kong (Appellate Jurisdiction) dismissing an appeal by way of Case Stated by a district judge of the District Court of the Colony of Hong Kong in respect of his decision acquitting the respondents, Pat Chiuk-Wah, Yeung Kwong-Fat, Shum Kiang-Bot and Ng Shin-Woo on six charges of forgery.

J G Le Quesne QC and R G Penlington (of the Hong Kong Bar) for the Crown.

L J Blom-Cooper QC and E Cotran for the respondents.

**LORD DIPLOCK:** The questions in this appeal are whether insurance stamps issued pursuant to regulations made under the National Insurance Act 1965 of the United Kingdom constitute: (i) ‘valuable securities’, for the purpose of supporting a charge of forgery under s 4 (2) (a) of the Forgery Ordinance Hong Kong, and (ii) a ‘document ... evidencing the title of any person to any ... interest in any public ... fund ... of any part of Her Majesty’s dominions’, for the purpose of supporting

a charge under s 11 (d) of the same Ordinance. The district judge answered both these questions, 'No'. His decision was upheld on appeal by Case Stated by a majority of the Supreme Court of Hong Kong.

Section 4 of the Forgery Ordinance, so far as it is relevant, provides as follows:

'(2) Forgery of the following documents, if committed with intent to defraud, shall be felony and punishable with imprisonment for fourteen years—(a) any valuable security or assignment thereof or indorsement thereon, or, where the valuable security is a bill of exchange, any acceptance thereof ...'

Section 2 contains an extended definition of 'valuable security' as follows:

'The expression "valuable security" includes any writing, entitling or evidencing the title of any person to any share or interest in any public stock, annuity, fund, or debt of any part of Her Majesty's dominions or of any foreign State, or in any stock, annuity, fund, or debt of any body corporate, company, or society, whether within or without Her Majesty's dominions, or to any deposit in any bank, and also includes any scrip, debenture bill, note, warrant, order, or other security for the payment of money, or any authority or request for the payment of money or for the delivery or transfer of goods or chattels, or any accountable receipt, release, or discharge, or any receipt or other instrument evidencing the payment of money or the delivery of any chattel personal.'

The Attorney-General of Hong Kong contends that national insurance stamps, even if not included within the expression 'valuable securities' in its ordinary meaning, fall within the words 'any receipt or other instrument evidencing the payment of money'. It is accordingly necessary to see what is the function of these stamps under the United Kingdom legislation.

National insurance stamps are issued for the purposes of the United Kingdom National Insurance Act 1965. That Act by s 83 makes provision for a national insurance fund into which are to be paid all contributions payable under the Act by insured persons and their employers, and out of which are to be paid inter alia all claims for benefits. Sections 2 to 7 impose on insured persons or their employers a statutory liability to pay weekly contributions to the fund. The amounts of the contributions are expressed in shillings and pence. Section 14, which provides for regulations to be made by the Minister, contemplates that those regulations may provide for contributions to be payable by means of adhesive insurance stamps to be sold through any post office.

The National Insurance and Industrial Injuries (Collections and Contributions) Regulations 1948, which remain in force under the Act of 1965, provide by reg 2 for the issue to every insured person of an insurance card. Regulation 6 provides for the payment of weekly contributions by affixing insurance stamps to the insurance card for the appropriate weeks for which those contributions are made. The Act provides for payment out of the fund of 12 different kinds of benefit to insured persons. The insured person's entitlement to benefit, of which 'unemployment benefit' dealt with in s 19 of the Act is a typical example, is dependent inter alia on his having paid a specified minimum number of contributions into the fund. The National Insurance Act 1965 thus places on the insured persons and employers to whom it relates a statutory obligation to pay money into the national insurance fund. The actual payment of money is made by the contributor to the Post Office, in return for which he receives a national insurance stamp. It is not, however, credited to him as a contribution to the national insurance fund until it is affixed to his national insurance card. There is also provision for repayment of its value to the person in possession of a stamp which he does not need for affixing to a card.

Their Lordships, in agreement with the dissenting judgment of HOGAN CJ, are inclined to the view that a national insurance stamp falls within the ordinary meaning of a 'valuable security', but they have no doubt that it clearly evidences 'the payment of money' by or on behalf of the contributor, so as to bring it within the extended meaning. It has been argued for the respondents that, even if the stamp evidences the payment of money, it is nevertheless not an 'instrument' as required by the extended definition. In their Lordships' view, the expression 'instrument' in the context of the Forgery Ordinance is not confined to a formal document, but includes any document intended to have some effect, as evidence of, or in connection with, a transaction which is capable of giving rise to legal rights or obligations. The stamp fulfils this requirement.

Their Lordships are accordingly of the opinion that a national insurance stamp of the United Kingdom falls within the words of the definition of 'valuable security', i.e. 'any receipt or other instrument evidencing the payment of money' and that the offence under s 4 (2) (a) of the Forgery Ordinance was made out. They agree with the dissenting judgment of HOGAN CJ. His careful and cogent citation of the relevant authorities makes it unnecessary for their Lordships to refer to them.

In order to constitute an offence under s 11 (d) of the Forgery Ordinance it is not sufficient that the stamp should be an instrument evidencing the payment of money. It must fall within the words in s 11 (c) 'any document . . . evidencing the title of any person to any share or interest in any public . . . fund . . . of any part of Her Majesty's dominions.' In their Lordships' view, 'interest' in a fund includes a contingent interest. The entitlement of a contributor to various types of benefit under the National Insurance Act 1965 is dependent on his having affixed to his national insurance card a specified minimum number of stamps. The insurance card, with the stamps affixed to it, thus evidences his title to a contingent interest to be paid out of the national insurance fund the amount of the benefits to which the Act entitles him on satisfying the other relevant conditions laid down in the Act.

It has been contended for the respondents that until the stamp has been affixed to a national insurance card it does not become evidence of the title of any person to an interest in the fund. Their Lordships agree with HOGAN CJ that the answer to this contention is to be found in s 3 (3) (b) of the Forgery Ordinance. So far as is relevant, it provides:

'forgery of a document may be complete even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law.'

In their Lordships' view it does not matter that the stamp until it is affixed to the card so as to form a composite document of which the stamp is a part would not be sufficient in law to evidence the title of a contributor to an interest in the national insurance fund.

Their Lordships will accordingly humbly advise Her Majesty that this appeal should be allowed. As the Attorney-General for Hong Kong has stated that no further proceedings are to be taken against the respondents, there is no need to remit the case to the district court.

*Appeal allowed.*

Solicitors: Charles Russell & Co; Stephenson, Harwood & Tatham.

T.R.F.B.



QUEEN'S BENCH DIVISION

(Lord Widgery, CJ, Ashworth and Willis, JJ.)

12th, 15th May 1971

BROKELMAN v BARR

*Customs—Knowingly signing false declaration on Customs form—Exemption from customs duty—Person 'resident outside the United Kingdom'—Residence outside United Kingdom for not less than 12 months during previous 24 months—Meaning of 'resident'—Reference to number of days spent outside United Kingdom—Customs and Excise Act, 1952, s 301—Customs Duty (Personal Reliefs) Order, 1970 (SI 1970, No 55), arts 2 (2), 5. Customs—Knowingly signing false declaration on Customs form—Person entering United Kingdom—'Anything contained in his baggage or carried with him'—Carriage in vessel—Motor car purchased abroad—Finance Act, 1968, s 6 (1).*

Article 5 of the Customs Duty (Personal Reliefs) Order, 1970, exempts a person resident outside the United Kingdom from paying duty in respect of goods imported by him. By art. 2 (2): 'For the purposes of this order a person shall be treated as resident outside the United Kingdom if, and only if, during the period of 24 months ending on the date of his entry into the United Kingdom he has been so resident for a period of, or for periods together amounting to, not less than 12 months.'

The appellant, a German national, had lived for most of his life at the home of his parents in Germany. He first came to England in 1967 in connection with the business of a German company and thereafter paid a succession of visits to England. From September, 1969, to July, 1970, he took a course in business management at Birmingham University. While in England he stayed mainly in hotels, but latterly rented a room. Up to Oct. 23, 1970, he had spent a total of 434 days in England during the two-years period preceeding that date. On that date he landed at Newhaven with a motor car purchased in Germany and signed a Customs declaration form stating that during the period of 24 months ending on that date he had been resident outside the United Kingdom for a period of, or for periods together amounting to, not less than 12 months. On his arrival at Newhaven he failed to declare the motor car. He was convicted of (i) knowingly signing a declaration form which was untrue in a material particular, contrary to s. 301 (3) of the Customs and Excise Act, 1952, and (ii) of failing to declare a motor car which he had obtained outside the United Kingdom and was required to declare, contrary to s. 6 of the Finance Act, 1968. On appeal.

**HELD**, that both convictions must be quashed. (i) The word 'resident' in arts. 2 (2) and 5 of the order of 1970 was to be construed according to its established meaning as implying some degree of permanence. Accordingly, whether or not on the facts proved the applicant could properly be described as resident in England, he was during the material period still resident in Germany at his parents' home, and, therefore, was not guilty of making a false declaration when he signed the Customs form. (ii) The carriage envisaged by s. 6 (1) of the Finance Act, 1968, was carriage by sea or air and included goods carried in the hold of a ship, and, therefore, on their true construction, the words 'anything . . . carried with him' included the appellant's motor car, and since the appellant was a person 'entitled to exemption from payment of duty' within s. 6 (1) by reason of the setting aside of the conviction under the Act of 1952, the conviction under the Act of 1968 must also be set aside.

**CASE STATED** by Lewes (East Sussex) by justices.

On 26th October 1970 an information was preferred by the respondent Gordon Charles Barr against the appellant charging that (1) at Newhaven on or about 23rd October 1970 he signed a declaration on Customs Form C104D, being a document for the purpose of an assigned matter, namely, customs, which was untrue in a material particular, in that he declared that he had spent less than 12 months in the United Kingdom, whereas, in fact, he had spent time in excess of 12 months, contrary to

s 301 (3) of the Customs and Excise Act 1952, and it was alleged that the offence was committed knowingly. (2) At Newhaven on or about 23rd October 1970 being a person entering the United Kingdom, he failed to declare a motor car, which he had obtained outside the United Kingdom and which he was required to declare, contrary to s 6 of the Finance Act 1968.

On the hearing of the informations at Lewes Magistrates' Court on November 13, 1970, the following facts were found. The appellant was a single man aged 27. He was a German national. He had lived in Germany the major part of his life and he still lived, when he was there, at the home of his parents. At some time in the past he joined a firm or a company in Germany. When he arrived in England for the first time in 1967 he came in connection with the business of a German company and worked here for the counterpart of that German company. He arrived in England for the first time with a motor car and he had since visited this country with motor cars, including a BMW 2002 motor car, which he purchased new in Germany in March 1969 for DM 11,000, i.e. approximately £1,100. He had paid in Germany the purchase tax on the car and also the road fund licence and insurance which were due there every year. Whilst he had been in England he had stayed mainly in hotels, but latterly he paid for the rent of a room in Birmingham and had stayed there. He had kept his bank account in England as a non-resident. In September 1969 he started a course in business management at Birmingham University which he completed in July 1970. At that time he was desirous of studying for a degree of Master of Arts at the same university and at least one of the objects of his visits to England on 22nd October 1970, and on 23rd October 1970 was to see the Rector of the university and to discuss with him his further education. During the two years prior to 23rd October 1970, he had been staying in England for the following periods: 23rd October to 9th December 1968, 19th January to 25th January 1969, 28th January to 13th March 1969, 17th September to 20th December 1969, 4th January to 2nd April 1970, 23rd April to 1st October 1970; therefore, the appellant had stayed in the United Kingdom a total of 434 days during the period from 23rd October 1968 to 23rd October 1970. According to the appellant, he had spent about four weeks in Eire during that period, but it is immaterial whether he did so or not, since the period which he spent in England during the two years in question must, in any event, have exceeded 365 days. On 22nd October 1970 at about 10.45 pm the appellant landed with his BMW 2002 car in Dover. He was seen there by customs officer Barry Rook. He was then asked by the Customs officer: 'Where are you normally resident?' The appellant replied: 'In Germany'. The Customs officer then asked him how long he intended to stay in this country on this occasion and he replied: '3½ weeks for a holiday.' The Customs officer subsequently asked the appellant to produce his passport in order to satisfy himself that the appellant enjoyed customs reliefs to which temporary visitors to this country are entitled under art 5 of the Customs Duty (Personal Reliefs) Order 1970. The appellant produced his German passport which had been issued in London on 13th August 1969. The entries in this passport showed that the appellant had been staying in this country for 339 days from 13th August 1969 to 22nd October 1970. The appellant was then asked by the Customs officer whether he had been resident in the United Kingdom between October 1968 and 13th August 1969, and the appellant answered that question in the negative and said that he had been here only on a couple of visits before August 1969. The Customs officer then asked the appellant to complete form C104D, which is headed: 'Declaration by Importer of Motor Vehicle'. This declaration stated (inter alia):

'I, Gisbert Brokelmann declare that during the period of 24 months ending on the date of my entry into the United Kingdom, I have been resident outside

the United Kingdom for a period of, or for periods together amounting to, not less than 12 months.'

The Customs officer then indicated to the appellant the warning at the head of the declaration which reads:

'Any person who makes or signs or causes to be made or signed any declaration relating to the Customs which is untrue in any material particular is liable to a fine or imprisonment or both, and the goods to which the declaration relates may be liable to forfeiture (section 301, Customs and Excise Act, 1952).'

The appellant then signed the declaration and initialled the warning. The Customs officer then asked the appellant whether it was a true declaration and the appellant replied: 'It must be true as I have signed it.' The appellant was then invited to accompany the Customs officer to the interview room. He was there asked whether he had any document to prove his point that he had not been resident in the United Kingdom for more than 365 days in the last two years. Eventually the appellant produced a business diary for the year 1969. It went back to January 1969 and showed entries relating to British companies and to what appeared to be appointments connected with persons associated with those companies. From these entries it emerged clearly that the appellant had spent more than 365 days in this country during the last 24 months. The appellant had with him at Newhaven—a Labour Permit issued by the Home Office dated 5th July 1967, authorising him to enter employment with ABR Food Machinery Co Ltd, of Bletchley, for 12 months from 3rd July 1967; a letter from the Home Office dated 13th November 1968 extending the appellant's previous stay in this country as stamped in his passport (which stamp was for an extension of three years) and a Barclaycard issued for one year expiring on 28th February 1970. The Customs officer then spoke to one Rigby, chief preventive officer and, as a result, Mr Rigby told the appellant that he would not be entitled to bring his vehicle into this country, unless he paid duty and tax on it and that, alternatively he could re-export his vehicle or that it could be detained and re-exported when he had completed his holiday. The appellant then decided to return with his car from Dover to the Continent and left with his car on the next boat at about 8.20 am on 23rd October 1970 for Dunkerque. Throughout the interviews Customs officer Rook had always used the word 'resident' in relation to the appellant's stay in this country and the appellant had maintained throughout that he was resident in Germany. According to the evidence of the Customs officer, which the justices accepted, the word 'resident' seemed to worry the appellant and in that officer's experience many people confused residence with nationality. When the appellant left Dover as aforesaid he must have known that he had spent more than 365 days during the last 24 months in this country. On 23rd October 1970 at 10.45 pm the respondent, a preventive officer of HM Customs and Excise, was on duty at Newhaven. He saw the appellant in his car at about 11.00 pm. His car was seen to head towards the red channel which is for passengers who have chargeable goods to declare, and then changed towards the green channel, which is for passengers who have no chargeable goods to declare. Numerous public notices explain the difference between the two channels. The respondent who, before he began to question the appellant, knew that the latter's car had been stopped at Dover, then intercepted the appellant's car in the lane heading to the green channel and asked him where he was resident. The appellant replied that he was resident in Germany. The respondent then asked the appellant for how long he intended to remain in this country and he said one week. The respondent then asked the appellant how long he had spent in this country during the previous two years, and the latter replied 'A total of not more than 11 months.' The respondent then asked the appellant to accompany him to

a separate room, and when they both got there he asked him for documentary evidence to confirm his residence. The appellant produced his passport and other documents. The papers which he produced showed that his car had been detained at Dover and the reason for its being detained. The respondent then produced to the appellant a written declaration, Form C104D, which was headed: 'Declaration by Importer of Motor Vehicle'. The respondent explained the document to the appellant and read to him the warning at the head of the said document. He pointed out to him its importance and the penalties for a false declaration. He also explained to him that residence outside the United Kingdom meant that the importer must have spent less than 12 months in this country in the preceding 24 months on the date of entry. The appellant then signed the declaration. The appellant was further questioned in the presence of the chief preventive officer, cautioned under the Judges' Rules and told that his car was seized as liable to forfeiture and that he was liable to customs duty and purchase tax. Throughout this interview with the respondent the appellant had steadfastly maintained that it was his opinion that he was not an English resident. He maintained that he was a German resident throughout the period in question, because he felt that all his connections were German and that his connection with Germany was greater than his connection with England. The respondent conceded that there is no definition of the word 'residence' in the order, save the reference to that word in art 2 (2) thereof. His own view of the meaning of that word in the order was 'spending a certain amount of time'.

It was contended by the appellant: (1) The declaration on Form C104D which the appellant had signed at Newhaven on 23rd October 1970 was not untrue in any material particular in that he had truthfully declared therein that during the period of 24 hours ending on the date of his entry into the United Kingdom, he had been resident outside the United Kingdom for a period of, or for periods together amounting to, not less than 12 months. It was argued that the respondent was wrong in stating in his information that the appellant had spent less than 12 months in the United Kingdom, whereas, in fact, he had spent time in excess of 12 months. The appellant had used the word 'resident' and not the word 'spent' in his declaration and he was entitled to relief as a temporary visitor under art 5 of the Customs Duty (Personal Reliefs) Order 1970, if (inter alia) he was resident outside the United Kingdom. Article 2 (2) of the order stated that:

'For the purposes of this order a person shall be treated as resident outside the United Kingdom if, and only if, during the period of twenty-four months ending on the date of his entry into the United Kingdom he has been so resident for a period of, or for periods together amounting to, not less than twelve months.'

The order contained no definition of the word 'resident'. It was immaterial whether the appellant was resident in the United Kingdom more than 12 months during the 24 months' period ending on 23rd October 1970. The issue was whether he was resident outside the United Kingdom not less than 12 months during that period. The word 'resident' implied a degree of permanence. The appellant could have two residences. He was a German national. His temporary absences from Germany could not deprive him of his German residence. During the two-years period in question the appellant had kept his permanent home in Germany, where he lived in his parents' house. He was employed as an industrial merchant by a German company in Germany. He intended to return to Germany. He felt and still feels that he is a German resident because all his connections are German, or, at any rate, those connections are greater than his connections with England (it was conceded that, if the appellant had made an untrue declaration within the meaning of s 301 (1) of the Customs and Excise Act 1952, he had done so knowingly within the meaning

of s 301 (3)). (2) On its true construction s 6 of the Finance Act 1968 could not apply to a motor car. It was a misuse of the English language to say that a motor car was a thing contained in a person's baggage or carried with him, within the meaning of s 6 (1). It was the motor car which carried the person with it and not vice versa. The object of the declaration was to avoid the delay, embarrassment and costs of the search of every person entering the United Kingdom but no declaration was required in the case of a motor car which could not be overlooked by a Customs officer. Section 6 (2) which dealt with the answering of questions put by a Customs officer was to the same effect. Section 6 (3) dealt with penalties for breaches of the provisions of s 6 (1) and (2) and must, therefore, be construed with reference to those subsections. The words 'any thing' must, therefore, be construed as a shortened version of the expression 'any thing contained in his baggage or carried with him' in s 6 (1). They could not be construed out of their context as meaning any article. This was borne out by the words 'as required by this section' in s 6 (3), which constituted a clear reference to the requirements of the earlier subsections.

It was contended by the respondent: (1) The appellant was not a 'temporary visitor' within the meaning of art 5 of the Customs Duty (Personal Reliefs) Order 1970. The word 'resident' outside the United Kingdom in arts 2 (2) and 5 (a) of the order dealt with the number of days which the person concerned had spent outside the United Kingdom and, if that person could establish that he had spent 365 days or more outside the United Kingdom during the period of 24 months ending on the date of his entry into the United Kingdom, he might be granted relief from customs duty and purchase tax as a 'temporary visitor' under art 5 of the order, provided he could satisfy the other conditions of the article. The order would be quite unworkable if the word 'resident' in the order had the meaning contended for by the appellant. The appellant had not been resident outside the United Kingdom for a period of, or for periods together amounting to, not less than 12 months during the period of 24 months ending on the date of his entry into the United Kingdom. The appellant knew when he entered the United Kingdom on 23rd October 1970 that he had been resident in the United Kingdom more than 12 months during the period of 24 months ending on the date of his entry into the United Kingdom and, therefore, he was guilty of an offence under s 301 (3) of the Customs and Excise Act 1952 when he signed the declaration. (2) The words 'any thing' in s 6 (3) of the Finance Act 1968 were in the widest possible terms and, therefore, they included a motor car. The legislator had intentionally omitted the words 'contained in his baggage or carried with him' in sub-s (1) and the similar words in sub-s (2) of the section and, therefore, he must have intended to give a wider meaning to the words 'any thing' in sub-s (3) thereof. The appellant had failed to declare his motor car and, therefore, he had failed to declare a 'thing' and was guilty of an offence under s 6 (3) of the Act.

The justices were of opinion that both contentions of the respondent were right, and that (1) the words 'he is resident outside the United Kingdom' in art 5 of the Customs Duty (Personal Reliefs) Order 1970 meant, according to art 2 (2) of the order, that the appellant had spent not less than 12 months outside the United Kingdom during the period of 24 months ending on the date of his entry into the United Kingdom on 23rd October 1970, that the appellant's signed declaration to the effect of 23rd October 1970 was untrue in a material particular within the meaning of s 301 (1) of the Customs and Excise Act 1952, and that he committed the offence under s 301 (1) of the Act knowingly within the meaning of s 301 (3) thereof and that (2) the words 'any thing' in s 6 (3) of the Finance Act 1968 were of the widest possible terms and included any article and, therefore, they also included a motor car and that, as the appellant had failed to declare his motor car, he was guilty of

an offence under s 6 of the Act, and, accordingly, they found both cases proved, fined the appellant £50 on each offence and recommended restoration of the car to the appellant.

C G Allen for the appellant.

G M Waller for the respondent.

*Cur adv vult*

19th May. **ASHWORTH J** read this judgment of the court: This is an appeal by way of Case Stated from a decision of justices for the county of East Sussex, sitting at Lewes, whereby they convicted the appellant of two offences. The first of these was that of knowingly signing a declaration which was untrue in a material particular, contrary to s 301 (3) of the Customs and Excise Act 1952; the second was that of failing to declare a motor car which he had obtained outside the United Kingdom, contrary to s 6 of the Finance Act 1968. The result of the appeal depends on the construction of the relevant statutory provisions and accordingly the facts may be summarised shortly.

The appellant is a German national aged 27 and he has lived in Germany the major part of his life and he still lives, when he is there, at the home of his parents. He first came to England in 1967 in connection with the business of a German company and thereafter paid a succession of visits to this country. In September 1969 he started a course in business management at Birmingham University which he completed in July 1970. While in England he stayed mainly in hotels, though latterly he rented a room in Birmingham and stayed there.

The offences were alleged to have been committed on 23rd October 1970 and, as will appear later, one of the crucial questions is that of the appellant's residence during the two years preceding that date. During that period he stayed in the United Kingdom a total of 434 days. Late on 22nd October 1970 he landed at Dover with a motor car and after customs officers had made enquiries into his movements during the preceding two years they informed him that he would not be allowed to bring the motor car into this country unless he paid duty and tax on it. Thereupon the appellant decided to return with his car to the Continent and he left early on 23rd October for Dunkerque. Late on 23rd October the appellant again landed in England, together with his motor car, this time at Newhaven, and further discussions took place with Customs officers, in the course of which the appellant signed a declaration on form C104D in which he stated:

'I . . . declare that during the period of 24 months ending on the date of my entry into the United Kingdom, I have been resident outside the United Kingdom for a period of, or for periods together amounting to, not less than 12 months.'

It is this statement which the respondent alleged was untrue in a material particular. There is no dispute that the appellant failed on his arrival at Newhaven to declare the motor car and this failure was the basis of the second charge.

The first charge involves consideration of the Customs Duty (Personal Reliefs) Order 1970. This order is divided into eight parts, and Parts 2 to 7 deal respectively with different classes of persons entering the United Kingdom, the heading to Part 2 being Temporary Visitors. In Part 2 there is included art 5, the relevant portion of which is in the following terms:

'Subject to the provisions of this Part and Part 8 of this order, a person entering the United Kingdom shall not be required to pay any duty chargeable in respect of any goods imported by him whether or not carried with him or



contained in his accompanied baggage on condition that (a) he is resident outside the United Kingdom; (b) he intends to depart finally from the United Kingdom within 12 months from the date of his entry; (c) the goods are intended solely for his or his dependants' personal use or that of some other entitled person; and (d) in any case where he intends to remain for a period exceeding six months from the date of his entry, the goods are on importation declared to the proper officer . . .'

The Order does not contain any definition of the word 'resident' but art 2 (2) is a provision of great importance in regard to that word's meaning. It is in the following terms:

'For the purposes of this order a person shall be treated as resident outside the United Kingdom if, and only if, during the period of twenty-four months ending on the date of his entry into the United Kingdom he has been so resident for a period of, or for periods together amounting to, not less than twelve months.'

One object of this provision is no doubt to limit the scope of the exemption from duty created by art 5, and to exclude, for example, a person who has only gone abroad shortly before the date when he seeks to re-enter this country with duty-free goods. But while art 2 (2) introduces a time element in respect of residence, it does not of itself throw any light on the question what is meant by residence outside the United Kingdom.

The word 'residence' has come before the courts in a number of cases of which the most familiar are those relating to income tax and voting rights. In an often-cited passage taken from *Levene v Inland Revenue Comrs* (1), VISCOUNT CAVE LC said:

'My Lords, the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word "reside". In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. Thus, a master mariner who had his home at Glasgow where his wife and family lived, and to which he returned during the intervals between his sea voyages, was held to reside there, although he actually spent the greater part of the year at sea: *Re Young* (2). *Rogers v Inland Revenue* (3). Similarly a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here—although if he is the owner of foreign possessions or securities falling within Case IV. or V. of Sch. D, then if he has actually been in the United Kingdom for a period equal in the whole to six months in any year of assessment he may be charged with tax under r. 2 of the Miscellaneous Rules applicable to Sch. D. But a man may reside in more than one place. Just as a man may have two homes—one in London and the other in the country—so he may have a home abroad and a home in the United Kingdom, and in that case he is held to reside

(1) [1928] AC 217; [1928] All ER Rep 746.

(2) (1875), 1 Tax Cas 57.

(3) (1879), 1 Tax Cas 225.

in both places and to be chargeable with tax in this country. Thus, in *Cooper v Cadwalader* (1), an American resident in New York who had taken a house in Scotland which was at any time available for his occupation, was held to be resident there, although in fact he had only occupied the house for two months during the year; and to the same effect is the case of *Lowenstein v de Salis* (2).'

This passage was followed and applied by LORD DENNING MR in *Fox v Stirk* (3). In the judgment of this court there has gradually been developed and established a rule of construction that prima facie at least residence involves some degree of permanence. As was said by Widgery LJ in *Fox v Stirk*:

'It is imperative to remember in this context that "residence" implies a degree of permanence. In the words of the Oxford English Dictionary, it is concerned with something which will go on for a considerable time. Consequently a person is not entitled to claim to be a resident at a given town merely because he pays a short, temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence.'

It is argued for the appellant that the foregoing is the correct approach to the present case and that the word 'resident' in arts 2 (2) and 5 should be construed accordingly, with the result that the appellant was truly resident outside the United Kingdom, namely, at his home in Germany, and there was nothing false in his declaration to that effect.

For the respondent it is argued that this approach gives no or no sufficient weight to what was described as the totting-up provision in art 2 (2). It is contended that this provision was inserted with the object of simplifying a Customs officer's task, when he is called on to decide whether a person has been resident outside the United Kingdom for not less than 12 months in the period of 24 months preceding his entry into the United Kingdom. Once it is found, as in the present case, that the person has spent 434 days out of 730 inside the United Kingdom, there is no difficulty in holding that he is not to be treated as having been resident outside the United Kingdom in that period. It is urged that although the words 'so resident' at the end of art 2 (2) clearly relate back to the words 'resident outside the United Kingdom', they should be construed as importing a factual situation, under which the person actually was out of the United Kingdom for the given period. Lastly, it is urged that, if the appellant is right, no practical meaning can be given to the totting-up provision.

The problem is not free from difficulty, but in the judgment of this court the appellant's contentions are right. There is nothing in the order itself to suggest that the meaning of the word 'resident' is different from that given to it in a number of decided cases, nor is there any compelling reason from the practical point of view why the word should not be construed in a way similar to that adopted in those cases. Moreover the respondent's contentions involve more than interpretation: they involve in effect amending the wording of art 2 (2) so that it conforms with a concept of residence which could have been expressed in plain words if such had been the draftsman's intention. It is unnecessary to decide whether on the facts the appellant could properly be described as resident in England or what the consequences of the decision would be. It is sufficient for the purposes of this appeal to hold that the appellant was for the material period still resident in Germany at his parents' home and therefore was not guilty of making a false declaration when he signed form C104 D.

(1) (1904), 5 Tax Cas 101.

(2) (1926), 10 Tax Cas 424.

(3) 134 JP 576; [1970] 3 All ER 7; [1970] 2 QB 463.

The second charge involves consideration of s 6 of the Finance Act 1968. Before the justices reliance appears to have been placed on sub-s (3) on the footing that in some way it enlarged the scope of sub-s (1) and (2), but counsel for the respondent rightly disclaimed any intention of seeking to uphold the conviction on that ground. He was content to base his case on the wording of sub-s (1). The relevant words of s 6 (1) are as follows:

'Any person entering the United Kingdom shall . . . declare any thing contained in his baggage or carried with him which (a) he has obtained outside the United Kingdom . . .'

The 'thing' which the appellant admittedly failed to declare was his motor car which he had undoubtedly obtained outside the United Kingdom. Nobody has suggested or could suggest that it was contained in his luggage, but was it carried with him? It is to be noted that the expression is not 'carried by him' but 'carried with him'. Counsel for the respondent emphasised the undoubted fact that, unless the person swims the Channel, he is bound to be carried by sea or by air in order to enter the United Kingdom, and accordingly the carriage envisaged in s 6 (1) is carriage by sea or air. Once that point is appreciated, it requires no effort to realise that there may also be carried with the person a thing or things, for example, goods in the hold of the ship in which he himself is carried.

In the judgment of this court there is no answer to this argument. It was, however, rightly conceded by counsel for the respondent that, if the appellant succeeded in setting aside the conviction under the Customs and Excise Act 1952, the conviction under the Finance Act 1968 must likewise be set aside having regard to the concluding words of s 6 (1). Accordingly, although the respondent succeeds on the issue as to the meaning and effect of s 6, he cannot sustain the conviction. The result is that the appeal is allowed and both convictions are quashed.

*Convictions quashed.*

Solicitors: *Buckeridge & Braune; Solicitor, Customs and Excise.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(FENTON ATKINSON, L.J., LAWTON AND JAMES, JJ.)

16th June 1971

HICKMOTT v CURD

*Criminal Law—Obtaining pecuniary advantage by deception—Evasion of debt—Information—Correct statement of offence—Inaccurate particulars—Overwhelming evidence of fraud on part of defendant—No prejudice or embarrassment caused by wrong particulars—Theft Act, 1968, s 16 (1).*

The appellant, while in the bar of a public house, ordered and was supplied with three drinks. On each occasion he was told the price and was asked for payment. He made no payment, but after the second drink had been supplied he said that he had the money and showed some money to the barmaid. After the third drink had been supplied he was asked for payment for the three drinks, but he left the bar and hid in his boot four £1 notes which he had in his possession. When he returned to the bar and was asked by the manager for payment, he declined to pay and falsely stated that he had no money and that his money had been mislaid. Neither the barmaid nor the manager believed that statement. The police were summoned and the appellant told a constable that he could not pay because someone had taken his money. The constable did not believe this. The appellant was convicted at a magistrates' court on an information which alleged that he 'dishonestly obtained for himself a pecuniary advantage, namely, the evasion of a debt for which he was then liable [to the owners of the public house] by deception.' Particulars were added, which stated 'namely, by a false oral representation that he had no money with which to pay for three double brandies of the value of £1 2s 6d supplied to him, whereas he was in possession of £4 12s 4d in money', contrary to s 16 (1) of the Theft Act, 1968. These particulars were inaccurate because neither the barmaid nor the manager had believed the appellant when he told them that he had no money.

HELD: the charge contained a clear statement of the offence, it was not necessary to set out the particular means by which the object had been achieved, and the statement of offence was sufficient to direct the appellant to s 16 (1); it was clear on the evidence that the appellant had acted fraudulently throughout, knew the charge which he had to meet, and had not been prejudiced or embarrassed by the erroneous particularisation; the conviction, accordingly, should stand.

CASE STATED by justices for the borough of Worthing.

On 28th November 1969 two informations were preferred by the respondent, Detective Inspector Gerald Hillary Curd, against the appellant, Colin John Hickmott, charging (1) that, on 27th November 1969 at Worthing, he dishonestly obtained for himself a pecuniary advantage, namely, the evasion of a debt for which he was then liable to Roberts and Son Ltd, by deception, namely, by a false oral representation that he had no money with which to pay for three double brandies of the value of £1 2s 6d supplied to him, whereas he was in possession of £4 12s 4d in money, contrary to s 16 (1) of the Theft Act 1968 and (2) that, on 27th November 1969 at Worthing, he did assault Keith Hayward Strudwick, a constable of the Sussex constabulary then acting in the execution of his duty, contrary to s 51 (1) of the Police Act 1964.

On the hearing of the informations at Worthing Magistrates' Court the justices found the following facts proved or admitted. At approximately 9.00 pm on 27th November 1969 the appellant was in the long bar of the Thieves' Kitchen public house, Bedford Row, Worthing. The appellant ordered and was supplied with three separate double measures of brandy by the barmaid, Miss Jennifer Black, and on each occasion he was told the price of each double measure was 7s 6d and was asked for payment. The appellant made no payment for any of the measures of brandy supplied to him but, after the second double measure had been ordered by and supplied to the appellant, he stated words to the effect that he had the

money and displayed four £1 notes to the barmaid, Miss Black. The appellant was supplied with a third double measure at his request, the barmaid believing him to have sufficient money to pay for the three measures served to him. The appellant was then asked to make full payment for the drinks ordered by him and supplied to him and he left the bar and went to the men's lavatory, where he placed the four £1 notes in his boot. The appellant at no time paid for the drinks supplied to him and, when asked for payment by the manager, he declined to pay and stated that he had no money and that his money had been mislaid. Further, when questioned by the police, the appellant stated: 'Yes, I ordered the drinks but I cannot pay because I have lost my money', and later, 'Someone has taken my money'. The statements made by the appellant to the manager and to the barmaid, Miss Black, that he had not the money to pay for the drinks ordered and that he had lost his money were at no time believed by them or by the arresting officer. The appellant was told he was being arrested for obtaining a pecuniary advantage by deception and cautioned and he replied, 'I can't pay'. Pc Strudwick, wearing uniform, then took the appellant by the left arm in order to effect the arrest and the appellant struck the police constable in the stomach with his clenched fist, causing the officer to double forwards. At the time Pc Strudwick arrested the appellant, the police constable was in full possession of all the facts relating to the events which had occurred including a statement by the barmaid, Miss Black, that she had seen the appellant in possession of some £1 notes and that she had served the appellant with further drinks in the belief that he had the money to pay for them. The appellant was then taken forcibly into custody and evicted from the public house and in the swing doors Pc Strudwick was struck on the neck by the appellant. There was insufficient evidence to show that this blow was intentionally struck by the appellant. It occurred in the general struggle in attempting to escort the appellant through the swing doors. The appellant was searched at the police station shortly after 9.30 pm and four £1 notes were found in his right boot and 12s 4d elsewhere on his person. The appellant made a written statement under caution in which he admitted ordering drinks of the value of £1 2s 6d and that he had said he would not pay for all the drinks but only half his share. Further, that he had hidden the four £1 notes in his boot to avoid the possibility of another man, with whom he had previously had a disagreement, taking the money and that he had forgotten it was there until later in police custody. The appellant was charged with the two offences set out in the informations described above and, after caution, made no reply. At the time of the incidents described above the appellant was under the influence of alcohol, but not to the extent that he was incapable of understanding and appreciating both the nature and meaning of his actions.

The justices were of the opinion that the appellant had dishonestly obtained for himself a pecuniary advantage by evading payment of a debt for which he had made himself liable, that the reference in s 16 (2) (a) of the Theft Act 1968 to a debt included evasion or deferment of payment of a debt, that the arresting officer was acting within the execution of his duty and that the appellant had assaulted him while effecting the arrest, that it was unnecessary for them to decide whether, if they were wrong in deciding that an offence had been committed as described in the first information, the arresting officer was still acting within the execution of his duty, and that the appellant was guilty of each of the offences charged. The justices, therefore, convicted the appellant and imposed the following penalties—on the first information a fine of £10 and an order for the appellant to pay £5 towards the costs of the prosecution, and on the second information a fine of £15.

The questions for the opinion of the High Court were (i) whether the reference in

s 16 (2) (a) of the Theft Act 1968 to a debt included evasion or deferment of payment of a debt? (ii) whether, on the facts found by the justices and properly directing themselves, they were entitled to convict the appellant of the two offences charged? (iii) whether, if the justices were wrong in respect of their conviction of the appellant on the first information, the arresting officer was still lawfully acting within the execution of his duty?

*W H Dunn* for the appellant.

*T S G Baker* for the respondent.

**FENTON ATKINSON LJ:** This is a Case stated by the Worthing justices in respect of their adjudication on 21st January 1970 when they convicted the appellant of two offences, the first of obtaining a pecuniary advantage by deception contrary to s 16 of the Theft Act 1968, and secondly of assaulting a constable acting in the execution of his duty contrary to s 51 of the Police Act 1964. The justices fined the appellant £10 on the first and £15 on the second information. Although it is not directly relevant, the serious matter from the appellant's point of view was that the conviction for these offences involved him being in breach of the conditions of a suspended sentence to which he was then subject and which was later made operative. [His Lordship then set out the facts found by the justices and continued:] On those facts it seems clear in my judgment that this was a case of a man getting three double brandies dishonestly by deception and it is really overwhelmingly clear on the evidence that from the outset he had no intention of paying, that when the barmaid became pressing after the second brandy he made display of money as a further representation to her that he could pay and intended to pay, and then there was the concealing of the money when the time came when payment could no longer be evaded, and the pretence that he had no money to pay. This was a typical sort of case in my view, which formerly would have come under s 13 of the Debtors Act 1869, of a man obtaining refreshment on credit when he really had no intention to pay at all. But the offence charged was under s 16 of the Theft Act 1968, the section which has repealed and replaced with additions s 13 of the Debtors Act 1869. The charge in the first information in this case was this:

'that on the 27th day of November, 1969, at Worthing, he dishonestly obtained for himself a pecuniary advantage, namely, the evasion of a debt for which he was then liable to Roberts and Son, Limited, by deception'

There was a quite clear statement of offence under the Theft Act 1968. But then the prosecution went on to add particulars, which they need not have done, because as set out in Stone's Justices' Manual, 1971 ed., vol. 1, p. 355:

'It will be sufficient in describing the offence to use the words of the statute; but where the particular means used to effect the object are essential to the description of the offence, they should be set out distinctly in the information.'

Here the particular means were not essential to the description of the offence. However, the prosecution did set out their particulars. They said:

'namely, by a false oral representation that he had no money with which to pay for three double brandies of the value of £1. 2. 6d., supplied to him, whereas he was in possession of £4. 12. 4d., in money, contrary to s. 16 (1) of the Theft Act, 1968.'

The second charge was that on 27th November he assaulted a constable then acting in the execution of his duty contrary to s 51 (1) of the Police Act 1964.



The difficulty, and the only difficulty, which arises in this case is the form of the particulars advanced by the prosecution, because when the evidence came to be given it was quite clear that neither the manager nor the barmaid had believed the appellant when, after his return from the lavatory, he pretended that he had no money, so that particular part of the deception did not operate on their minds. But the statement of offence directed the appellant to s 16 (1). There was the most overwhelming evidence that he was fraudulent from the outset of this transaction, and the fact that the prosecution gave these particulars, in particular the allegation which was not substantiated, should not invalidate the conviction.

When one looks at the Case Stated, it is clear that the argument was not simply confined to this one point that the alleged deception in fact did not deceive, so that was the end of the case. It is clear from reading the Case, summarising how the matter was advanced on both sides, that the argument ranged far and wide, and I would take the view that the erroneous particularisation could not have prejudiced or embarrassed the appellant, who knew perfectly well what he was there to meet, i.e. dishonestly and by deception obtaining these three brandies to the value of £1 2s 6d. Other points have arisen. One is, and this was counsel for the appellant's second point, that in fact the debt was not evaded; the police were sent for and the man was arrested. He accepts that payment of the debt was evaded and he has to concede on the present authorities that that was enough having regard to the decisions in *R v Page* (1) and *R v Locker* (2) to which we were referred.

There remains the issue as to the police officer. The submission there is that once he had heard the whole story, including the fact that the manager and the barmaid were not in fact deceived by the pretence that the appellant had no money, the officer had no reasonable grounds for thinking that an arrestable offence under s 16 (1) of the Theft Act 1968 had been committed. I cannot myself agree for a moment with that submission. It is clear on the findings that the officer had heard the whole story, and it may well be that he had formed a much sounder and more accurate view of the true nature of the deception practised than the prosecution, or whoever it was who drew the particulars of charge 1, and on the information given to him there was the plainest possible ground for concluding that there had been an offence under s 16 (1), and it was an offence for which he could properly arrest this man.

In my view there is nothing whatever in the appeal so far as it relates to the second point. But the matter is not wholly satisfactory because of these erroneous particulars which were given. It seems to me that the offence was sufficiently set out in the charge, the whole matter was ventilated, and on the evidence and on the facts found the justices really had no alternative but to convict on the first charge and I would dismiss this appeal.

**LAWTON J:** I agree with the judgment given by FENTON ATKINSON LJ and I have nothing to add. I too would dismiss the appeal.

**JAMES J:** I also would dismiss this appeal.

*Appeal dismissed.*

Solicitors: Ward, Bowie & Co, for Davies, Thomas & Cheale, Worthing; Waterhouse & Co, for J E Dell & Loader, Shoreham.

T.R.F.B.

(1) ante p. 376; [1971] 2 All E.R. 870.

(2) ante p. 437; [1971] 2 All E.R. 875.

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**COURT OF APPEAL (CRIMINAL DIVISION)**

(PHILLIMORE, LJ, MACKENNA AND O'CONNOR, JJ)

24th May 1971

**R v DODGE AND HARRIS**

*Criminal Law—Forgery—False document—Necessity that document should tell lie about itself—Bonds duly executed—False statements contained in bonds—Forgery Act, 1913, s 1.*

By s 35 (1) of the Criminal Justice Act, 1925: "For the purpose of removing doubts, it is hereby declared that a document may be a false document for the purposes of the Forgery Act, 1913, notwithstanding that it is not false in any such manner as is described in s 1 (2) of that Act."

In order that a document may be a false document within the meaning of s 1 of the Forgery Act, 1913, as explained by s 35 of the Criminal Justice Act, 1925, it is essential that the document should tell a lie about itself.

The appellant H owed money to G. In order to discharge G from pressing his claim, H falsely pretended to G that the appellant D owed him (H) £24,000. H made out two bonds, one for £7,000 and the other for £3,000, purporting to be payable by D to H. D signed them as a favour to H. The bonds were properly executed by D, but the statements in them with regard to the respective sums were untrue. H showed the bonds to G and thus reassured him. D was convicted of forgery and H of uttering forged documents.

**HELD:** as the false statements in the bonds were lies about the intention of the parties to implement the bonds and not about the bonds themselves, the bonds were not forged documents, and the convictions must be quashed.

**APPEALS** by Ronald Ernest Dodge and Bernard Harris against their convictions at the Central Criminal Court when the appellant Dodge was convicted of forgery and the appellant Harris, inter alia, of uttering forged documents. The appellant Dodge also appealed against sentence.

*N B Cockburn* for the appellant Dodge.

*R L Boxall* and *Ian Glick* for the appellant Harris.

*P B Pollock* for the Crown.

**PHILLIMORE LJ** delivered this judgment of the court: These are appeals against conviction. In the case of the appellant Dodge he appeals against conviction on two counts of forgery, and he also appeals against sentence. In the case of the appellant Harris, he pleaded guilty to three charges of obtaining money by deception. On these there is no appeal. But he appeals against two counts of uttering forged documents.

The two appellants appeared at the Central Criminal Court on 23rd February 1971. The appellant Dodge was sentenced in respect of two counts of forgery to one year's imprisonment concurrent on each count, the sentence being suspended for three years. The appellant Harris was sentenced to one year's imprisonment concurrent on the three charges of obtaining money by deception to which he pleaded guilty and on which there is no appeal, and in addition he was sentenced to six months' imprisonment concurrent on two counts of uttering, these sentences of six months concurrent being ordered to run consecutively to the term of one year, so that his total was 18 months' imprisonment.

The story is a very short one, and the point that is taken is a very technical one. The appellant Harris met and borrowed money from a man called Gold, and he told Mr Gold, in order to encourage him to lend the money, that he, Harris, was expecting a legacy of £24,000. Subsequently, when that was discovered by Mr Gold



to be untrue, he said that in fact he was owed £24,000 by the appellant Dodge. When he was told that, Mr Gold had just issued a writ for the moneys he had lent to the appellant Harris, and that was said by Harris to discourage him from pursuing his writ. In order to help the appellant Harris, the appellant Dodge agreed to the following plan. The appellant Harris made out two bonds, one for £7,000 and one for £3,000, purporting to be payable by the appellant Dodge to the appellant Harris. These documents were quite properly executed by the appellant Dodge. But, of course, the statements with regard to these sums were untrue. The appellant Harris showed the documents to Mr Gold, and thus reassured him. The appellant Dodge signed these documents as a favour to the appellant Harris.

At the trial a submission was made to the Common Serjeant that these two bonds were not forgeries in law, and, accordingly, that when the appellant Harris showed them to Mr Gold, he was not uttering a forgery. However, the Common Serjeant overruled this submission and directed the jury that the documents were capable of being regarded as forgeries. In the result the appellant Dodge was convicted of forgery and the appellant Harris of uttering.

The point really turns on the wording of the Forgery Act 1913. Section 1 (1) defines forgery as follows:

'For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine, and in the case of the seals and dies mentioned in this Act the counterfeiting of a seal or die, and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided.'

Now the words 'making a false document' in plain, simple language would be wide enough, I suppose, to cover a document which contains statements which are untrue, but the words have always been interpreted in a restricted sense—the phrase that is used is that the document must tell a lie about itself. Section 1 (2) provides:

'A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false:—(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it.'

Quite clearly none of these descriptions applies to these two bonds.

The way in which the matter is put is this. Counsel for the appellant Dodge, who has put his arguments very concisely, says this, that any implication which one can infer from the document that the parties intended to implement is a lie as to the intention of the parties, but is not a lie as to the document itself. It is a lie about something that is extrinsic. So in a very old case, *R v Jones* (1), a man called William Jones was indicted for that he had in his custody a forged paper writing purporting to be a bank note, which was worded as follows: 'I promise to pay John Wilson, Esq.

(1) (1779), 1 Doug KB 300; 1 Leach 204.

or Bearer, Ten Pounds', and then it was dated 'London, March 4, 1776. For Self and Company of my Bank in England'; signed 'John Jones'. He was charged with forgery on the ground that this document was in effect a sham. He had no bank account which warranted his making out this note. But LORD MANSFIELD CJ ruled that, although there might be false representation, there was no question there of forgery. It was not a forgery. The document did not tell a lie about itself. Thus in a case very similar to the present case the document was held not to justify a count of forgery. There is no doubt, of course, that if the two appellants had been charged under s 16 of the Theft Act 1968, there would have been no defence. The only doubt that arises is derived from a decision of the Court of Criminal Appeal, albeit a court of five judges, in *R v Hopkins, R v Collins* (1). The accused were convicted at Somerset Quarter Sessions of fraudulent conversion and forgery. What had happened was this. They were respectively secretary and treasurer of the Wells Football Supporters' Club and moneys were paid to one or other of them from time to time which apparently they put into their own pockets, but it appears that they recorded the sums paid in the cash book. It does emerge from the judgment of LORD GODDARD CJ that they had subsequently altered the books so as to suggest that lesser sums had been paid than were in fact. It may be that it was on that ground that the decision of the Court of Criminal Appeal turned. Their decision that there had been a forgery could be supported on the ground that there had been a material alteration within the meaning of the section which I have read. Whether that be so or not, the case has been heavily criticised by all the textbook writers including in particular Smith and Hogan (Criminal Law, 2nd Edn (1969), p 444) who suggest that the decision was wrong.

However that may be, this court is entirely clear that these two bonds were not forgeries within the meaning of the Forgery Act 1913 as explained by the provisions of s 35 of the Criminal Justice Act 1925, and that these convictions of forgery and uttering were wrong and must be quashed. In the result so far as the appellant Dodge is concerned, the conviction is quashed and the question of sentence passed on him does not therefore arise. As for the appellant Harris, his convictions on counts 4, 6 and 8 are quashed, with the result that he has only to serve his sentences of one year's imprisonment passed on counts 1, 2 and 3 to which he pleaded guilty.

*Appeals allowed.*

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.

T.R.F.B.

(1) (1957), 41 Cr App Rep 231.

COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW, LJ, GEOFFREY LANE AND KILNER BROWN, JJ)

8th, 11th June 1971

R v PIKE

*Criminal Law—Sentence—Youthful offender—Age within limits qualifying for Borstal training—Suspended sentence—Sentence valid when originally passed—Bringing into operation not passing of sentence—Suspended sentence ordered to run consecutively—Total term within prohibited range—Validity of total term—Criminal Justice Act, 1961, s 3—Criminal Justice Act, 1967, s 40 (1).*

Section 3 of the Criminal Justice Act, 1961, prohibits the passing on youthful offenders within the age limits which qualify them for Borstal training of a sentence of more than six months or for less than three years (or eighteen months, if the offender has served a previous sentence of Borstal training).

The language of s 40 (1) of the Criminal Justice Act, 1967, makes it clear that an order bringing a suspended sentence into operation does not constitute the passing of a sentence. Accordingly, if a suspended sentence of imprisonment was valid when originally imposed, there is nothing to prevent that sentence from being validly brought into operation concurrently with or consecutively to a subsequent sentence, notwithstanding the fact that the total term resulting therefrom would, if it had been imposed at the time when the suspended sentence was imposed, had been within the range prohibited by s 3.

APPEAL by Eric John Pike from a sentence of imprisonment imposed at Liverpool Crown Court.

A D Kennedy for the appellant.

*Cur adv vult*

11th June. **MEGAW LJ** read this judgment of the court: This appeal is concerned with yet another of the many problems which arise out of the limitations imposed by s 3 of the Criminal Justice Act 1961 in respect of sentences of imprisonment on persons under 21. The appellant is now 20 years of age. Before the events with which we are concerned he had served a sentence of Borstal training. Hence, so far as he is concerned, the effect of s 3 (1) and (3) of the 1961 Act is that 'a sentence of imprisonment shall not be passed by any court' on him unless it is for six months or less or for 18 months or more.

On 29th October 1969 at Liverpool Crown Court sentences involving a total term of 18 months' imprisonment were passed on the appellant for burglary and other offences. That sentence was suspended for two years. On 16th November 1970, again at Liverpool Crown Court, the appellant was convicted of attempted theft. We shall refer to this as the substantive offence. He had been caught on 4th May 1970 while trying to pull lead and copper pipes from a derelict house belonging to Liverpool Corporation. The court passed a sentence of three months' imprisonment on him for the substantive offence. The court also ordered that the suspended sentence should take effect with the substitution of a lesser term, namely 12 months, for the original term of 18 months. Thus substitution was ordered under s 40 (1) (b) of the Criminal Justice Act 1967. As required by that subsection, the court gave its reasons for not ordering that the suspended sentence should take effect with its original term unaltered. It is unnecessary to go into these reasons. Since the court ordered that the suspended sentence should commence on the expiration of the term of three months for the substantive offence, the total term which the appellant was required to serve was 15 months.

Leave was given by the single judge to appeal against sentence. The point, and the only point, argued by counsel for the appellant is that the term of 15 months' imprisonment is invalid because it is within the range prohibited by s 3 of the 1961 Act in respect of this appellant. The court is indebted to counsel for his clear and forceful argument, which necessarily, though unfortunately, raises intricate questions of statutory interpretation of both the 1961 Act and the Criminal Justice Act 1967. We say 'unfortunately' because it is undesirable that matters of this sort relating to the powers of a court as to sentence should be anything other than simple, clear and straightforward.

The primary question which has to be decided is whether the Liverpool Crown Court in ordering that the suspended sentence should take effect with the substituted term of 12 months was itself passing a sentence. For s 3 (1) of the 1961 Act uses the words 'a sentence of imprisonment shall not be passed'. That question has already been considered by this court in *R v Lamb* (1). It is true that that case differed in various respects from the present case. In particular, one of the grounds on which *R v Lamb* was decided does not here exist. In that case the appellant Lamb was already actually serving a sentence of six months' imprisonment when the suspended sentence, also of six months' imprisonment, was ordered by quarter sessions to take effect consecutively. Thus s 3 (2) of the 1961 Act applied so that the limitations of s 3 (1) did not apply. The court in *R v Lamb*, however, also decided that quarter sessions, in ordering the suspended sentence to take effect, did not itself 'pass' a sentence of imprisonment by so ordering. What it did was simply, in the words of s 40 (1) of the Criminal Justice Act 1967, to 'deal with him' in accordance with that subsection. That part of the decision in *R v Lamb*, whether it be regarded as obiter dictum, or, as we think it should be regarded, as part of the ratio decidendi, is attacked by counsel for the appellant. He submits that the court's attention in *R v Lamb* cannot have been directed to s 40 (9) of the 1967 Act, which provides:

'For the purposes of any enactment conferring rights of appeal in criminal cases any such order made by a court shall be treated as a sentence passed on the offender by that court for the offence for which the suspended sentence was passed.'

Counsel for the appellant submits that, as a result of that subsection, the court which orders a suspended sentence to take effect must be regarded as 'passing' that suspended sentence, whether in its original form under s 40 (1) (a), or, as here, with a substituted term, under s 40 (1) (b). Thus, it is argued that the substituted term of 12 months' imprisonment, was 'passed' by Liverpool Crown Court, and it was an invalid sentence by reason of s 3 (1) of the 1961 Act.

In our judgment, that submission is wrong. It ignores the opening words of s 40 (9) which make it clear that the purpose and effect of the subsection is not general, but is limited. It is, and is expressed to be, for the limited purpose of enactments conferring rights of appeal. For the purpose of ensuring that one against whom a suspended sentence has been put into effect shall have an effective right of appeal, or of application for leave to appeal, against the putting into effect of the suspended sentence, it was regarded as necessary that the suspended sentence should be treated as having been 'passed' as a sentence at a time when the order was made putting it into effect. But the very fact that that provision was necessary for this particular purpose is at least a strong indication that for all other purposes the suspended sentence was not passed at that time. It was passed when the suspended sentence was originally imposed. Section 39 (1) of the 1967 Act says so. By reason of s 40 (9), the appellant can validly appeal against the order that the suspended sentence shall

(1) 132 JP 575; [1968] 3 All ER 206; [1968] 2 QB 829.

have effect. But that does not produce the result that the court, considering that appeal, have to treat it, for the purposes of s 3 (1) of the 1961 Act, as having been passed at a time when, apart from the special 'treating' for a particular purpose, it was not passed.

The wording of s 40 (1) shows that the order putting a suspended sentence into effect is not the passing of a sentence. It remains as having been 'passed' when it was originally imposed. Thus s 40 (1) (b) is so worded as to show that it is not a new sentence which is being passed; it is a sentence, previously passed, which is being brought into effect with a substituted term.

Counsel for the appellant further submitted that s 104 (2) of the Criminal Justice Act 1967 has the effect of making the whole term of 15 months' imprisonment a single term; thus it must be treated as having been passed as one single sentence; and thus it contravenes s 3 (1) and (3) of the 1961 Act. It is to be observed that s 104 (2) begins with the words: 'For the purposes of any reference in this Act . . .' When the 1961 Act was enacted there was no such thing as a suspended sentence. In *R v Lamb* (1) the court took the view that s 104 (2) did not affect the issue as to s 3 of the 1961 Act. We respectfully agree with that view. We do not think that there is any valid criticism of the reasoning in *R v Lamb*.

In our judgment, there is nothing in the relevant legislation which precludes a suspended sentence of imprisonment, which was valid under s 3 of the 1961 Act when originally imposed, from being brought into effect, concurrently with or consecutive to, a subsequent sentence, although the result may be that the total term of imprisonment would, if it had been originally imposed at the time when the suspended sentence was imposed, have been within the range prohibited by s 3 of the 1961 Act. Accordingly the sentence in the present case is valid and the appeal is dismissed.

*Appeal dismissed.*

*Solicitor: Registrar of Criminal Appeals.*

T.R.F.B.

(1) 132 JP 575; [1968] 3 All ER 206; [1968] 2 QB 829.

**COURT OF APPEAL (CRIMINAL DIVISION)**

(MEGAW, LJ, GEOFFREY LANE AND KILNER BROWN, JJ)

24th June, 5th July 1971

R v GOSNEY

*Road Traffic—Dangerous driving—Not an absolute offence—Need to prove fault on part of driver—'Fault'—Deliberate misconduct, recklessness or moral blame not necessarily involved—Failure to show care or skill of competent and experienced driver sufficient—Momentary lapse—Inference of fault from facts of situation—Right of driver to prove special facts avoiding inference—Road Traffic Act, 1960, s 2 (1).*

Dangerous driving contrary to s 2 (1) of the Road Traffic Act 1960 is not an absolute offence. The prosecution must prove not only a situation which, viewed objectively, was dangerous, but also that there was some fault on the part of the driver causing that situation. 'Fault' does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards or moral blame, but it does involve a failure, a falling below the care or skill of a competent and experienced driver in relation to the manner of the driving and the relevant circumstances. A fault in that sense is sufficient, even though slight or a momentary lapse or such that normally no danger would have arisen from it. The fault need not be the sole cause of the dangerous situation; it is sufficient if, looked at sensibly, it is a cause. Such a fault will often be proved as an inference from the very facts of the situation, but if the driver seeks to avoid the inference by proving some special fact, relevant to the question of fault in that sense, e.g. absence of indication by road sign that a particular turn was prohibited, he should be allowed to do so.

APPEAL by Doreen Rose Gosney against her conviction at Kent Quarter Sessions of driving a motor vehicle on a road in a manner which was dangerous to the public having regard to all the circumstances of the case, contrary to s 2 (1) of the Road Traffic Act 1960.

Michael Howard for the appellant.

Roger Buckley for the Crown.

*Cur adv vult*

5th July. **MEGAW LJ** read this judgment of the court: At about midnight on the night of 28th March 1970 two police officers were driving along the east bound carriageway of the A2 road near Northfleet which at that point is a dual carriageway. No doubt to their consternation, the police officers saw a motor car approaching them, being driven at about 30 mph in the wrong direction on the fast lane of that carriageway on which they were themselves travelling. There was no question of excessive speed or of any other irregularity in the manner of driving, except for the startling fact that the car was going in the wrong direction on a one-way part of this important highway. The driver of the car was the appellant, Mrs Doreen Rose Gosney.

On evidence of those simple facts the appellant was convicted at Kent County Quarter Sessions on 14th January 1971 of the offence of driving in a manner dangerous to the public contrary to s 2 of the Road Traffic Act 1960. She was given an absolute discharge. She appeals against conviction by leave of the single judge. If it had not been for the exclusion of evidence as the result of a ruling by the deputy chairman, there could be no possible criticism of the conviction. That ruling gives rise to a question of law of general importance which has to be decided in this appeal.

At the outset of the trial it was known that the prosecution were minded to challenge the relevance, and therefore the admissibility, of evidence which the



defence wished to offer. At the suggestion of the prosecution that issue was argued and decided at the outset. It is not necessary to consider whether that procedure was desirable. There is no dispute as to the general nature of the evidence which the appellant wished to offer. She desired to seek to prove, by her own testimony and by the production of plans and photographs, that it was through no fault of her own that she was driving on the wrong carriageway: she had turned right into the A2 at a road junction with which she was unfamiliar and at which, she wished to prove, there was no indication by road sign or otherwise that a right hand turn was prohibited; and there was nothing which would have indicated to a competent and careful driver, in the circumstances then and there prevailing, that she was about to drive, or was driving, her car on the wrong part of, and in the wrong direction on, a dual carriageway road. The deputy chairman ruled that such evidence would be irrelevant and therefore it was inadmissible. He accepted the prosecution's submission, based essentially on passages in the judgment of the Court of Criminal Appeal in *R v Ball*, *R v Loughlin* (1) that the only question was, it was expressed by counsel for the prosecution, 'the purely objective one', i.e. assuming that it was proved that the appellant was driving on the wrong side of the road (the wrong carriageway of a dual carriageway), was that driving dangerous? If it was, said the prosecution, the reason why she came to be on the wrong side could not, in law, be a defence. This was not a case where it could be said that, because of a sudden onset of epilepsy or such like matters, she was not truly driving at all; nor was it a case where the manner of driving was caused by a sudden defect in the machinery or structure of the car which could not have been anticipated. Apart from those recognised special cases, once it was established that the manner of driving was dangerous, or produced a dangerous situation, it did not matter, said the prosecution, so far as criminal liability was concerned, if she could show that the dangerous manner of her driving (the fact that she was driving her car in the wrong direction in the wrong part of the road) was without fault on her part.

The deputy chairman appears to have accepted that on that view of the law a driver would be guilty of dangerous driving even if the fact were that he had been positively directed, by a road sign which had been turned the wrong way round, to travel in the wrong direction. It would mean (to use as an illustration the facts of an actual case in which some years ago one member of this court was concerned as counsel, in the civil jurisdiction) that a driver would be guilty of dangerous driving where, as a result of an obstruction in the highway, he had been affirmatively directed by a police officer to travel on the wrong carriageway and there, without any lack of care on his part, collided with a car travelling in the opposite direction, the police having omitted to stop or warn traffic coming from that direction.

It may well be thought that, if that is indeed the law, while it may lead towards certainty, it offends the sense of justice. The deputy chairman dealt with that aspect by saying: 'The practical answer is that there would be no prosecution.' That is not much comfort to the accused if a prosecution is brought and he is precluded from proving the facts by cross-examination or direct evidence. By way of background, it may also be said that in an enactment designed primarily to promote safe and careful driving it is unlikely that Parliament intended to subject to the risk of conviction a driver who is doing nothing contrary to the standard of a competent and careful driver.

As has been said, the deputy chairman's ruling excluding the evidence was founded on what was said in *R v Ball*, *R v Loughlin* (1). That was a case which involved very special and unusual facts. It concerned a Territorial Army Ferret scout-car in which as a result of the structure of the vehicle the person at the controls did not have a

(1) (1966), 50 Cr App Rep 266.

<b>HUSBAND AND WIFE</b> – Matrimonial home – Separation order obtained by wife – Husband tenant of home – Power of court to exclude husband for limited time – Matrimonial Homes Act, 1967, s 1 (2). <b>Tarr v Tarr</b> .. .. .	CA	222
<b>HUSBAND AND WIFE</b> – Summary proceedings – Evidence – Unsworn statement of a party. <b>Aggas v Aggas</b> .. .. .	PDA	484
<b>HUSBAND AND WIFE</b> – Summary proceedings – Procedure – Justices' right to stop case at close of complainant's evidence – Application to matrimonial cases – Right of complainant's advocate to address justices. <b>Mayes v Mayes</b> .. .. .	PDA	487
<b>INFANT</b> – Custody – Order of magistrates – Appeal – Further evidence – Discretion of appellate court. <b>Re B (T A) (an infant)</b> .. .. .	Ch D	7
<b>LOCAL AUTHORITY</b> – Statutory powers – Enforcement – Assurance to company of land with access to and use of authority's property – Decision by authority to develop property as housing estate – Right to override company's rights. <b>Dowdy Boulton Paul Ltd v Wolverhampton Corporation</b> .. .. .	Ch D	333
<b>LOCAL GOVERNMENT</b> – London – Transfer of land – Land held for two purposes – Vesting in borough council. <b>Greater London Council v London Borough of Croydon</b> .. .. .	Ch. 2	466
<b>LOCAL GOVERNMENT</b> – Merger of council with other councils to form county borough – Loss of employment of clerk and solicitor – Re-settlement and long term compensation – Local Government (Compensation) Regulations, 1965, regs 8, 14 (1) (c) (f). <b>Myrddin-Baker v Teesside County Borough Council</b> .. .. .	QBD	152
<b>MAGISTRATES</b> – Committal to quarter sessions for sentence – Application to change plea of guilty. <b>R v Mufford and Lotheringland Justices. Ex parte Harber. R v East Suffolk Quarter Sessions. Ex parte Harber</b> .. .. .	QBD	107
<b>MAGISTRATES</b> – Domestic proceedings – Questions to witness – Interest of party – No positive case made by other party – Magistrates' Courts Act, 1952, s 61. <b>Brewster v Brewster</b> .. .. .	PDA	501
<b>MAGISTRATES</b> – Irish warrant – Endorsement – No inquiry whether prima facie case made out – Habeas corpus – Likelihood of prosecution or detention for political offence – Backing of Warrants (Republic of Ireland) Act, 1965, s 1 (2) (b). <b>R v Brixton Prison Governor. Ex parte Keane</b> .. .. .	QBD	38
<b>MAGISTRATES</b> – Natural justice – Magistrate acting in administrative or executive capacity – Duty to act openly, impartially and fairly – Seizure of sweet potatoes by local authority officer – Meeting between justice and local government officials before hearing – Box of sweet potatoes shown and sample cut open – Retirement at end of hearing of magistrate with public analyst and chief veterinary officer – Advice received, but not communicated to defendants – Food and Drugs Act, 1955, s 9 (3) – Colouring Matter in Food Regulations, 1966, reg 5 (1). <b>R v Birmingham City Justices. Ex parte Chris Foreign Foods (Wholesalers) Ltd</b> .. .. .	QBD	73
<b>PUBLIC ORDER</b> – Public place – Using threatening behaviour – Railway station platform – Public Order Act, 1936, ss 5, 9. <b>Cooper v Shield</b> .. .. .	QBD	434
<b>QUARTER SESSIONS</b> – Appeal – Plea – Change of plea – Enquiry whether plea of guilty at magistrate's court equivocal – Right to remit case to magistrate – Quarter sessions entitled to consider only what happened before magistrate – Nothing in proceedings before magistrate casting doubt on plea. <b>R v Marylebone Magistrate. Ex parte Westminster City Council. R v Inner London Quarter Sessions. Ex parte Westminster City Council</b> .. .. .	QBD	239
<b>QUARTER SESSIONS</b> – Committal for sentence – Gravity of offence apparent from nature of charge – Nothing emerging from facts stated by prosecution to increase gravity of offence – Magistrates' Courts Act, 1952, s 29. <b>R v Tower Bridge Magistrate. Ex parte Osman</b> .. .. .	QBD	427
<b>RACE RELATIONS</b> – Housing – Council houses – Tenants restricted to British subjects – Validity – Action for declarations by local authority – Competency – Race Relations Act, 1968, s 2 (1), s 19 (10). <b>London Borough of Ealing v Race Relations Board</b> .. .. .	QBD	131
<b>RATING</b> – Machinery and plant – Generation of power – Electric motors, hydraulic pumps, and air compressors – Motive power derived from electricity supplied to factory – Hydraulic and pneumatic power distributed throughout factory – Rating and Valuation Act, 1925, s 24 (1), Sched 3 (1) (a) – Plant and Machinery (Rating) Order, 1960, Sched. <b>Chesterfield Tube Co Ltd v Thomas (Valuation Officer)</b> .. .. .	CA	1

<b>RENT CONTROL</b> - Contract referred to tribunal - Entry upon consideration of reference - Papers considered by each member of tribunal individually - Assembly and visit to view premises - No admission obtained - Letter of withdrawal - Not operative till received by tribunal - Rent Act, 1968, s 73 (1).		
<b>R v Tottenham District Rent Tribunal. Ex parte Fryer Bros (Properties) Ltd</b> ..	<b>QBD</b>	<b>94</b>
<b>ROAD TRAFFIC</b> - Articulated vehicle with trailer - Use for unsuitable purpose - Unsuitability for load on route chosen - Motor Vehicles (Construction and Use) Regulations, 1969 (SI 1969, No 321), reg 76 (3).		
<b>British Road Services Ltd v Owen</b> ..	<b>QBD</b>	<b>399</b>
<b>ROAD TRAFFIC</b> - Causing death by dangerous driving - 'Cause' of accident - No need to prove substantial or major cause - Road Traffic Act, 1960, s 1.		
<b>R v Hennigan</b> ..	<b>CA</b>	<b>504</b>
<b>ROAD TRAFFIC</b> - Dangerous driving - Not absolute offence - Need to prove fault on part of driver - 'Fault' - Deliberate misconduct, recklessness or moral blame not necessarily involved - Failure to show care or skill of competent and experienced driver sufficient - Momentary lapse - Inference of fault from facts of situation - Right of driver to prove special facts avoiding inference - Road Traffic Act, 1960, s 2 (1).		
<b>R v Gosney</b> ..	<b>CA</b>	<b>529</b>
<b>ROAD TRAFFIC</b> - Driving test - Duty of examiner appointed by Ministry.		
<b>British School of Motoring Ltd v Simms and Another, Stafford Third Party</b> ..	<b>Assizes</b>	<b>103</b>
<b>ROAD TRAFFIC</b> - Driving while disqualified - Outstanding offences taken into consideration - Similar offence.		
<b>R v Jones</b> ..	<b>CA</b>	<b>36</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Arrest without warrant - Powers of police to detain thereafter - Road Safety Act 1967, ss 1, 2 (2), 2 (4), 3 (1), 4.		
<b>R v Mackenzie</b> ..	<b>Assizes</b>	<b>26</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Ascertainment of alcohol proportion - 'Ascertainment from laboratory test' - Drink consumed after cessation of driving - Adjustment of test - Road Safety Act, 1967, s 1 (1).		
<b>Rowlands v Hamilton</b> ..	<b>HL</b>	<b>241</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion exceeding prescribed limit - Attempting to drive - Car stopped by person wrongly believed by defendant to be police officer - Ignition keys handed over - Departure of defendant from car - Return - Demand for handing back of keys - Refusal - Subsequent breath test - Road Safety Act, 1967, s 1 (1).		
<b>Harman v Wardrop</b> ..	<b>QBD</b>	<b>255</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion exceeding prescribed limit - Provision of specimen - Blood - Analysis by ordinary equipment and skill - Gas chromatography.		
<b>Smith v Cole</b> ..	<b>QBD</b>	<b>97</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion exceeding prescribed limit - Specimen for laboratory test - Failure to supply - Reasonable excuse - Excuse relating to blood specimen only - Liability to supply specimen of urine - Direction to jury - Road Safety Act, 1967, s 3 (3) (6).		
<b>R v Harling</b> ..	<b>CA</b>	<b>29</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion exceeding prescribed limit - Specimen for laboratory test - Hospital patient - Notification to medical practitioner of proposal to make 'requirement' - Failure to include in notification statutory warning of possible consequences of refusal - Road Safety Act, 1967, s 3 (2), (3), (10).		
<b>R v Knightley</b> ..	<b>QBD</b>	<b>453</b>
<b>ROAD TRAFFIC</b> - Heavy goods vehicle - Driver's licence - Application to licensing authority - Insufficient driving experience of applicant - Refusal - Appeal to justices - 'Person aggrieved' - Power in justices to order authority to grant licence - Road Traffic Act, 1960, s 195 (2), Sched 15, para 1.		
<b>R v Ipswich Justices. Ex parte Robson</b> ..	<b>QBD</b>	<b>462</b>
<b>ROAD TRAFFIC</b> - Light signals - Fire brigade vehicles - Passing red lights - Order regulating - Validity.		
<b>Buckoke v Greater London Council</b> ..	<b>CA</b>	<b>321</b>
<b>STATUTE</b> - Construction - Purposive interpretation - Act providing minimum sentences for specified criminal offences.		
<b>Kennedy v Spratt</b> ..	<b>HL</b>	<b>203</b>
<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Assessment - Application of <i>Pointe Gourde</i> principle to cases under Land Compensation Act, 1961, s 6 (1), Sched 1, part 1.		
<b>Wilson v Liverpool City Council</b> ..	<b>CA</b>	<b>168</b>

<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Reference to Lands Tribunal - Agreement between parties as to basis of assessment - Subsequent decision of House of Lords that that basis wrong - Power of court to remit case to tribunal - Discretion. <b>Wilson v Liverpool City Council</b> .. .. .	CA	168
<b>TOWN AND COUNTRY PLANNING</b> - Development - Open land used for market trading - Building erected over whole of site - Ground floor area remaining open - Automatic extinction of former use - New planning unit with nil use created. <b>Petticoat Lane Rentals Ltd v Secretary of State for the Environment</b> .. .. .	QBD	410
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Service - "Occupier" - Licensee - Caravan dweller - Town and Country Planning Act, 1962, s 45 (3) (a). <b>Stevens v London Borough of Bromley</b> .. .. .	ChD	380
<b>TOWN AND COUNTRY PLANNING</b> - Permission - Refusal - Appeal to Minister - Decision in accordance with general policy - Need for genuine consideration of particular matter - Town and Country Planning Act, 1962, s 179 (1) (3) (b). <b>H Lavender and Son Ltd v Minister of Housing and Local Government</b> .. .. .	QBD	186
<b>TOWN AND COUNTRY PLANNING</b> - Permission - Refusal - Authority required to purchase land - Compensation - Assessment. <b>Margate Corporation v Devotwill Investments Ltd</b> .. .. .	HL	19
<b>TRADE DESCRIPTIONS</b> - Defence - Act or default of another person - 'Another person' - Company - Commission of offence through breach of duty of branch manager - Trade Descriptions Act, 1968, s 11 (2), s 24 (1). <b>Tesco Supermarkets Ltd v Natrass</b> .. .. .	HL	289
<b>TRADE DESCRIPTIONS</b> - Defence - 'Mistake' - 'Act or default' - Offence due to conduct of employee - Trade Descriptions Act, 1968, s 24 (1) (a). <b>Birkenhead and District Co-operative Society Ltd v Roberts</b> .. .. .	QBD	194
<b>TRADE DESCRIPTIONS</b> - False description - Milk - Foil cap on bottle accurately describing milk and bearing retailer's name - Names of milk suppliers to whom bottle belonged embossed on bottle - Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1). <b>Donnelly v Rowlands</b> .. .. .	QBD	100
<b>TRADE DESCRIPTIONS</b> - False description - Sale of second-hand car - False number of miles on indicator - Defence - Reliance by defendants on information supplied to them - Act or default of another person - Failure to take all reasonable precautions or exercise all due diligence - Trade Descriptions Act, 1968, s 24 (1) (a) (b), (3). <b>London Borough of Richmond v Motor Sales (Hounslow) Ltd</b> .. .. .	QBD	236
<b>VAGRANCY.</b> See Criminal Law.		



full range of vision, so that he had to rely on instructions from another person standing in the turret of the scout-car. However, some at least of the observations in the judgment of the court appear to state propositions of general principle regarding the offence of dangerous driving. In that case these words were used:

'It has been held time and again that an offence under this section is an absolute offence . . . it is a liability on the driver which he cannot get rid of, and if the result of his driving produced what the jury consider to be a dangerous situation, a dangerous manoeuvre, then even though he had been completely blameless, he can be held liable.'

A little later this was said:

'The case of *Evans* (1) now sets out quite clearly that the test is a purely objective one and it matters not why the dangerous situation was caused or the dangerous manoeuvre executed.'

With very great respect, we disagree with both those passages. We do not think that they represent correctly the law as it had been previously stated in the authorities. We do not accept that the offence of dangerous driving is 'an absolute offence'. We do not accept that a driver who has been completely blameless can be held guilty. We do not accept that 'it matters not why the dangerous situation was caused'.

We do not propose to lengthen this judgment by considering in detail the various earlier authorities to which we were referred. Counsel for the Crown, when we invited him to refer us to the authorities in which it had been held that 'an offence under this section is an absolute offence', cited passages from the judgment of the Divisional Court in *Hill v Baxter* (2) and in *Simpson v Peat* (3). In the former case LORD GODDARD CJ said that 'no question of mens rea enters into the offence'. In the context, that means no more than this—a proposition which is now beyond dispute—that the prosecution do not have to prove an intention to drive badly. It does not mean that the offence of dangerous driving can be committed without fault on the part of the driver. If it did so mean, it would be inconsistent with what LORD GODDARD CJ had himself said earlier in *Simpson v Peat*. There, having first said that if a driver has driven without due care and attention or dangerously 'it matters not why he did so', he went on to give an example in which he said:

'if the driver was, in fact, exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted . . .'

We reject the suggestion of counsel for the Crown that there is some subtle distinction in this respect between the offence of driving without due care and attention on the one hand and dangerous driving on the other.

These being the only authorities cited in favour of the proposition of an 'absolute offence', in our judgment they do not establish the proposition. On the other hand, such other cases as *R v Spurge* (4) and *R v Evans* (1), in our judgment indicate reasonably clearly that fault is an essential element in dangerous driving. The well-known passage in the judgment of the Court of Criminal Appeal in *R v Evans* (1), so indicates by, for example, its reference to 'even doing his incompetent best'. 'Incompetent' involves fault—falling below the required standard of skill. The direction given to

(1) 127 JP 49; [1962] 3 All ER 1086; [1963] 1 QB 412.

(2) 122 JP 134; [1958] 1 All ER 193; [1958] 1 QB 277.

(3) 116 JP 151; [1952] 1 All ER 447; [1952] 2 QB 24.

(4) 125 JP 502; [1961] 2 All ER 688; [1961] 2 QB 205.



the jury by the trial judge in *R v Ball*, *R v Loughlin* (1) added to the *R v Evans* formula the further words, 'or whether he was a good driver doing his best in very difficult circumstances'. Those additional words brought in, as we think for the first time, the conception of liability without fault. The additional words would seem to have been approved, at least impliedly, by the Court of Criminal Appeal in that case. Indeed, such approval is implicit in the statement as to 'an absolute offence'. In our judgment, with great respect, it was a development of the law not warranted by authority or principle, and it was wrong.

We would state briefly what in our judgment the law was and is on this question of fault in the offence of driving in a dangerous manner. It is not an absolute offence. In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver, causing that situation. 'Fault' certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame. Thus there is fault if an inexperienced or a naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver. Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient. The fault need not be the sole cause of the dangerous situation. It is enough if it is, looked at sensibly, a cause. Such a fault will often be sufficiently proved as an inference from the very facts of the situation. But if the driver seeks to avoid that inference by proving some special fact, relevant to the question of fault in this sense, he may not be precluded from seeking so to do. So far as the burden of proof is concerned, it is unnecessary to repeat what was so clearly said by SALMON J in delivering the judgment of the Court of Criminal Appeal in *R v Spurge* (2).

It follows that the evidence sought to be tendered in the present case ought not to have been excluded. Counsel for the Crown conceded that on this view of the law he could not properly invite this court to apply the proviso to s 2 (1) of the Criminal Appeal Act 1968, for, whatever one's guess may be as to the difficulty of getting rid of the strong inference of fault on the facts which were proved, it cannot be assumed, the evidence not having been given, that a reasonable jury would necessarily have held that there was fault on the part of the appellant in the sense which we have explained. The appeal is therefore allowed.

*Conviction quashed.*

Solicitors: Registrar of Criminal Appeals; A C Staples, Maidstone.

T.R.F.B.

(1) (1966), 50 Cr App Rep 266.

(2) 125 JP 502; [1961] 2 All ER 688; [1961] 2 QB 205.

### COURTS-MARTIAL APPEAL COURT

(MEGAW LJ, GEOFFREY LANE AND KILNER BROWN, JJ)

10th June 1971

R v CLARKSON. R. v DODD. R v CARROLL

*Criminal Law—Aiding and abetting—Encouragement—Evidence of intention to encourage and actual encouragement required—Non-accidental presence at scene of crime.*

In order to establish the aiding and abetting of a crime by encouragement, it must be proved that the defendant intended to give encouragement and that he also wilfully encouraged in fact. Voluntary and non-accidental presence at the scene of a crime is not conclusive of aiding and abetting.

Dictum of HAWKINS J., in *R v Coney* ((1882), 46 JP 404; 8 QBD 534) that 'the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power to do so, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not' approved.

*R v Allan* (1963), 127 JP 511, approved.

APPEALS against convictions at a court-martial.

At a general court-martial at Menden, Germany, on 23rd October, 1970, the appellants David George Clarkson and Joseph Arthur Carroll were convicted on three charges of aiding and abetting rape and the appellant Walter John Dodd was convicted on one such charge. All the appellants were gunners in the Royal Artillery and they were charged along with four other gunners named Newton, Holloway, Marshall and Swain. On the first charge Newton was accused of rape, and the other six of aiding and abetting. On the second charge Holloway was accused of rape, and the other six of aiding and abetting. On the third charge Marshall was accused of rape, and the other six of aiding and abetting. All the accused persons were convicted on each charge, except that the appellant Dodd was convicted only on one charge, that of aiding and abetting rape by Holloway. The sentences of the appellants, after confirmation, were as follows: all three to be dismissed from the Service, Clarkson and Carroll each two years' detention; and Dodd one year's detention.

*A E Wright* for the appellants Clarkson and Dodd.

*Timothy Ryland* for the appellant Carroll.

*J A Baker* for the Crown.

MEGAW J delivered this judgment of the court: It is unnecessary to go into much detail as to the disgraceful and shameful events which took place on the night of 9th/10th May 1970 in which beyond doubt all the appellants, as well as others, were concerned. On no view can the conduct of any of them be regarded as other than deplorable. The question, however, is whether their convictions for criminal offences can be sustained.

The relevant facts will be recited as briefly as possible. The victim of the offences was an 18 years old girl named Elke von Groen. On 9th May 1970 she, having recently come out of hospital where she had undergone an operation on her womb, went to a party at the barracks at Menden. At about midnight she left the party to go to see a soldier with whom she had in the past been familiar. She went to his room. He was not there, but other soldiers were there. Eventually she went to another room, room 64, where the rapes occurred. There she was raped at least by Newton, by Holloway, and by Marshall at one time or another between midnight and about 3.15 am. She

was physically injured, and her clothes were torn to shreds. To say that those who attacked her behaved like animals would be unjust to animals. At some time after the raping began and when she had been screaming and moaning, there were clustered outside the door of room 64 a number of men, including the three appellants, probably in a drunken condition, no doubt listening to what was going on inside. The door of room 64 opened and they, including the three appellants, in the words of a witness 'piled into the room'. There is no doubt that they remained there for a considerable time and there is no doubt that during that time the unfortunate girl was raped. There is no doubt that some of those present actively assisted by helping to hold her down. However, so far as the appellants Clarkson and Carroll are concerned, there was no evidence of their having done any positive act to assist. There was no evidence that either of them helped to hold down the girl. The appellant Dodd's case is different. There was evidence of his active participation. We shall deal with his case separately.

First we shall consider the appellants Clarkson and Carroll. Their cases stand or fall together. That depends on whether there was a material misdirection by the judge-advocate in relation to the law with regard to aiding and abetting.

It is desirable to read the statements which were made by Clarkson and Carroll to the warrant officer of the Military Police who investigated these events with a view to finding whether there was evidence to substantiate the charges. Those statements of Clarkson and Carroll, were properly put in evidence. Clarkson did not give evidence at the court-martial. Carroll did, but Carroll's evidence does not add materially to or subtract materially from his statement to the Military Police.

The warrant officer investigating, Sergeant-Major Wainwright, first spoke to Clarkson and told him about the enquiries which had been made about allegations that Fraulein Elke von Groen had been raped by a number of men. The warrant officer cautioned Clarkson, and Clarkson said: 'I cannot remember much at all, I was drunk'. A further conversation took place in which, in answer to questions, Clarkson said that, though he was present, he did not touch the girl. He was asked: 'You did not help to hold her down?', and he said: 'No, I just watched'. He was asked about how many men he saw raping her, and he gave answers which, of course, did not provide admissible evidence against the men whom he mentioned. He agreed to make a written statement, which he asked Sergeant-Major Wainwright to write at his dictation. That statement was this:

'Last night I was in 56 Battery club and fell asleep in the club. I woke up about half-past eleven to a quarter to twelve, and I came upstairs and saw Elke in Gunner Marsh's room. She was looking for Marsh. And somebody said it was Gunner Boakes' birthday and she gave him a kiss. Then she left with Gunner Newton and Gunner Smith. She went into a room in 33 Battery. I followed them down there about five minutes later and saw a few men standing in a circle around the door. One of them opened the door and I saw Elke lying on the bed in the room, she had her dress halfway up her waist and her knickers were down by her ankles. A man was having intercourse with her. I could not see this man's face, his face was buried in her neck like. I left. I went to my room, but later I came back once. There were a lot more men in the room. Holloway was wiping his hands on a sheet. He had shit on his hands. Marshall was shagging her. She was struggling and crying this time and was being held down by Holloway. Carroll and Smith were watching, and two men, one named Major, I think it was him, were vomiting out of the window. I saw Newton, Holloway, Marshall and Carroll have intercourse with Elke, all against her will. She was screaming and shouting in German. I did not take part in holding her down, nor did I have intercourse with her. Holloway had

shit on his hands and he went out. The smell made me feel sick. I went out of the room and saw Bdr. Doyle going in. I went to be sick and went straight to bed.'

Let it be said that Bdr. Doyle there referred to was not involved in these disgraceful incidents. Indeed, it was his arrival which put an end to them.

Having been seen and asked questions, Carroll said: 'I was in the room, yes, but I did not rape her. I was just sick. I would like to make a statement'. Having been cautioned, he dictated a statement which was as follows:

'About 11 o'clock in the evening we left 56 Battery bar with Gunner Wheeler to go to the chip shop on the Sumern-Iserlohn Road. It was pretty packed so we went to the Pheasant—that is a German pub just across the road. We had a few beers and I was pretty drunk when I came back. As far as I can remember Wheeler went to bed and I went to the toilet to be sick. When I came up the stairs, there was a commotion in room 58, that is the last room in 56 Battery. Anyway this German girl, Helga, I don't know her second name, was looking for a Gunner Marsh. I can't remember exactly what happened next, but later on I was passing room 64 and there were two or three boys standing outside the door, arguing about who was going in next. The door was opened and we all went in together. There were a few in the room already, and I remember hanging out of the window vomiting. I didn't have sexual intercourse with her because when I went into the room there was a terrible smell because she had shit the bed. It was this smell that made me vomit. I was still hanging out of the window when Bdr. Doyle came into the room and told us to get out. I went to my bed and was got out of it later. As far as I can remember the only persons that I know were in the room were Marshall, Dodds, Holloway and Newton. I was very drunk. That's about it.'

A submission of no case was made on behalf of these two appellants at the close of the prosecution's case. The judge-advocate directed the court in accordance with court-martial procedure, and on that direction the court rejected the submission. Since there was evidence on which the court, properly directed, could reasonably have convicted in both cases, any error in that direction at that stage would not directly avail the appellants. The relevance of it, however, is that in his summing-up to the court at the conclusion of all the evidence, the judge-advocate did undoubtedly bring the minds of the court back to the direction which he had given earlier, in addition to dealing again with the law as to aiding and abetting.

As has been said, there was no evidence on which the prosecution sought to rely that either the appellant Clarkson or the appellant Carroll had done any physical act or uttered any word which involved direct physical participation or verbal encouragement. There was no evidence that they had touched the girl, helped to hold her down, done anything to her, done anything to prevent others from assisting her or to prevent her from escaping, or from trying to ward off her attackers, or that they had said anything which gave encouragement to the others to commit crime or to participate in committing crime. Therefore, if there was here aiding and abetting by the appellants Clarkson or Carroll it could only have been on the basis of inferences to be drawn that by their very presence they, each of them separately as concerns himself, encouraged those who were committing rape. Let it be accepted, and there was evidence to justify this assumption, that the presence of those two appellants in the room where the offence was taking place was not accidental in any sense and that it was not by chance, unconnected with the crime, that they were there. Let it be accepted that they entered the room when the crime was committed because of what

they had heard, which indicated that a woman was being raped, and they remained there.

*R v Coney* (1) decides that non-accidental presence at the scene of the crime is not conclusive of aiding and abetting. The jury has to be told by the judge, or as in this case the court-martial has to be told by the judge-advocate, in clear terms what it is that has to be proved before they can convict of aiding and abetting, what it is of which the jury or the court-martial, as the case may be, must be sure as matters of inference before they can convict of aiding and abetting in such a case where the evidence adduced by the prosecution is limited to non-accidental presence. What has to be proved is stated by HAWKINS J in a well-known passage in his judgment in *R v Coney* where he said:

'In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not.'

It is not enough, then, that the presence of the accused has, in fact, given encouragement. It must be proved that the accused intended to give encouragement; that he wilfully encouraged. In a case such as the present, more than in many other cases where aiding and abetting is alleged, it was essential that that element should be stressed, for there was here at least the possibility that a drunken man with his self-discipline loosened by drink, being aware that a woman was being raped, might be attracted to the scene and might stay on the scene in the capacity of what is known as a voyeur, and, while his presence and the presence of others might in fact encourage the rapers or discourage the victim, he himself, enjoying the scene or at least standing by assenting, might not intend that his presence should offer encouragement to rapers and would-be rapers or discouragement to the victim. He might not realise that he was giving encouragement, so that, while encouragement there might be, it would not be a case in which, to use the words of HAWKINS J, the accused person 'wilfully encouraged'.

A further point is emphasised in passages in the judgment of the Court of Criminal Appeal in *R v Allan* (2). That was a case concerned with participation in an affray. EDMUND DAVIES J, giving the judgment of the court, said:

'In effect, it amounts to this: that the learned judge thereby directed the jury that they were in duty bound to convict an accused who was proved to have been present and witnessing an affray if it was also proved that he nursed an intention to join in if help was needed by the side which he favoured, and this notwithstanding that he did nothing by words or deeds to evince his intention and

(1) (1882), 46 JP 404; 8 QBD 534.

(2) 127 JP 511; [1963] 2 All ER 897; [1965] 1 QB 130.

outwardly played the rôle of a purely passive spectator. It was said that, if that direction is right, where A and B behave themselves to all outward appearances in an exactly similar manner, but it be proved that A had the intention to participate if needs be, whereas B had no such intention, then A must be convicted of being a principal in the second degree to the affray, whereas B should be acquitted. To do that, it is objected, would be to convict A on his thoughts, even though they found no reflection in his actions.'

A further passage in the judgment is this:

'In our judgment, before a jury can properly convict an accused person of being a principal in the second degree to an affray, they must be convinced by the evidence that, at the very least, he by some means or other encouraged the participants. To hold otherwise would be, in effect, as counsel for the appellants rightly expressed it, to convict a man on his thoughts, unaccompanied by any physical act other than the fact of his mere presence.'

From that it follows that mere intention is not in itself enough. There must be an intention to encourage; and there must also be encouragement in fact, in cases such as the present case.

So we come to what was said by the judge-advocate. First there was the guidance which he gave to the court after the submissions had been made at the close of the prosecution's case. The relevance of that to the matters which the court now has to decide has already been mentioned. There is a passage in that guidance in which the judge-advocate said this:

'You have been told, correctly, the position as regards an aider and abettor, and that is all that the [appellant] is charged with in these three charges. To be an aider and abettor, a person need not take any active steps in the commission of a crime, but he must be in a position to render assistance or encouragement by actual or constructive presence, and he must share a common intention with them that the crime should be committed. An illustration is that of a jeweller's shop. One man will throw a brick through the window and somebody else will snatch the valuables inside. It might be said that they were the people who actually committed the offence itself, but on such an occasion there will be somebody standing by with a motor car to enable the others to make their getaway. Probably someone is on the corner to make sure there is no policeman about to arrive on the scene. One or two others may be present to thrust out a leg and trip up anybody who may interfere or get in the way, if necessary, of those who will go in pursuit. They are sharing a common intention that the offence should be committed and they are aiders and abettors. Other people may be standing by, but the mere fact that a person watches and just stands by without sharing the common purpose of the others, does not make him guilty of aiding and abetting.'

The judge-advocate draws the analogy which is commonly drawn where a direction is given in a case where two persons are jointly indicted, for example, on a charge of committing burglary. One actually enters the house and the other stands outside to keep watch. That analogy, in the view of this court, is misleading in relation to what was involved in the present case, for it presupposes a prior meeting of minds between the persons concerned as to the crime to be committed. The man who stands outside and does not go in is guilty of burglary because it cannot in such a case properly be said that he has taken no active step in the commission of the offence. He has gone to the place where he is and he has conducted himself as he does as a part of the joint plan, which, in its totality, is intended to procure commission of the crime.

In the view of this court the echo of that false analogy unfortunately continued



throughout when the judge-advocate came to sum up the matter to the court-martial. It had its influence on what he then said. In that summing-up there occurs this passage which, let it be said, the court has had some difficulty in interpreting:

'Now you have been reminded on many occasions of what the law says about aiders and abettors . . . It is necessary that those who are present should either take some active step to aid the commission of the offence or be present sharing the intention of the people who are actually perpetrating the crime, sharing not only their intent, but identifying themselves with the offence by being prepared to go to the assistance of the perpetrator if necessary, to prevent him being interrupted in his act, perhaps by barring a door or something of that nature or even by presence and support, standing by encouraging him in his act.'

It is, of course, entirely wrong to be critical of the precise wording of a direction provided that the general sense of it is sufficiently clear and can be seen to be accurate. It is wrong to take individual words or phrases and criticise them from the point of view of grammar or method of expression. This court is bound to say that, not approaching the matter on any such basis of meticulous criticism but from the point of view of considering whether it is a fair and clear expression of the relevant principles which have already been discussed, it does not find that what was there said would be likely to give to the court a sufficiently clear conception of the principles involved: the necessity for the prosecution to establish, where the evidence is of non-accidental presence without firm agreement or positive physical act of participation in the actual commission of the crime, the elements of intention to encourage or of actual encouragement having taken place.

There are other passages in the summing-up relating to the same matter which are susceptible of the same criticism. We do not propose to refer to them individually. It is right to say that towards the very end of the summing-up the judge-advocate comes nearer to expressing the principle correctly. Indeed, if that passage stood alone the court might well have had to consider with very great care whether it should not take the view that that passage, by itself and in itself, while subject to verbal criticism, might be regarded as having put the matter with sufficient clarity to the court. But when that passage is read, as it must be read, with the other passages in the summing-up and with the passages in the original direction on the submission, this court has come to the conclusion that the court-martial might have misunderstood the relevant principles that ought to be applied. It might have been left under the impression that it could find the two appellants guilty on the basis of their continuing, non-accidental, presence, even though it was not sure that the necessary inferences to be drawn from the evidence included (i) an intention to encourage and (ii) actual encouragement. While we have no doubt that those inferences could properly have been drawn in respect of each appellant on each count, so that verdicts of guilty could properly have been returned, we cannot say that the court-martial, properly directed, would necessarily have drawn those inferences. Accordingly the convictions of the appellants Clarkson and Carroll must be quashed.

The case of the appellant Dodd is wholly different. On the assumption that the statement which is said to have been made by him to the investigating warrant officer of the Military Police was rightly treated as being in evidence, there could be no doubt but that his active participation was proved in the aiding and abetting of the rape by Holloway, of which charge alone he was convicted. [After reviewing the evidence the learned lord justice stated that his appeal would be dismissed.]

*Orders accordingly.*

*Solicitors: Registrar of Courts-Martial Appeals; Director of Army Legal Services.*

T.R.F.B.

## COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, ROSKILL AND CAULFIELD, JJ)

8th, 23rd July 1971

R v SLOGGETT

*Criminal Law—Handling stolen goods—Indictment—Inclusion of words 'by or for benefit of another person'—Theft Act, 1968, s 22 (1).*

By s 22 (1) of the Theft Act, 1968: 'A person handles stolen goods if (otherwise than in the course of stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so'.

On the true construction of this section the words retention, removal, disposal or realisation are all governed by the words 'by or for the benefit of another person', which constitute an essential ingredient of the offence. A count in an indictment for an offence under the subsection should, therefore, always include the words 'by or for the benefit of another person'.

APPEAL by Sidney Ernest Sloggett against his conviction at Essex Quarter Sessions of handling stolen goods contrary to s 22 (1) of the Theft Act, 1968, he being then sentenced to two years' imprisonment.

R P Croxon for the appellant.

M E Ward for the Crown.

*Cur adv vult*

23rd July. **ROSKILL LJ** read the following judgment of the court: At the conclusion of the hearing on 8th July 1971, we dismissed the appellant's appeal against conviction but varied his sentence from a total of two years' imprisonment to a total of one year's imprisonment. Our reasons for so varying the sentence were given at the time, but, as the appeal against conviction raised a question of general importance under s 22 (1) of the Theft Act 1968, we said that we would put our reasons for dismissing the latter appeal into writing.

When the appellant (who was given leave to appeal by the single judge) appeared at Essex Quarter Sessions on 17th December 1970 the indictment contained only one count, that of handling of stolen goods contrary to s 22 (1) of the Theft Act 1968, the particulars being that, knowing or believing certain named goods to be stolen goods, he dishonestly received them. Before the appellant was arraigned, counsel for the Crown applied to the chairman (Roland Adams QC) for and received leave to add a second count to the indictment. The proposed second count also alleged handling stolen goods contrary to s 22 (1) of the Theft Act 1968, but gave particulars averring that the appellant, knowing or believing that those named goods were stolen, 'dishonestly assisted in the retention of the said goods'.

Two observations should be made regarding this proposed second count. First, in making the application counsel for the Crown was no doubt moved by what was said by the Divisional Court in *Griffiths v Freeman, Jones v Freeman* (1), namely, that although s 22 constituted but one offence the better practice when dealing with indictments might be to join separate counts describing the different methods of dishonest handling alleged against a particular defendant. We agree with those observations. On a count framed as was count 1 of the present indictment, it might have been sought to argue that a conviction for handling stolen goods on an alternative basis of dishonest retention could not be sustained. Secondly, the particulars of the proposed second count stopped short at the words 'retention of the said goods'.

(1) 134 JP 394; [1970] 1 All ER 1117.

The further words in the subsection 'by or for the benefit of another person' were not included in the particulars. Nor were those words subsequently referred to by the chairman in his summing-up.

Leave to add the second count was given by the chairman—in our view properly—and the appellant was arraigned on both counts. How right counsel for the Crown was to seek and obtain this leave is shown by what subsequently happened. By some curious mischance, the reason for which was not disclosed to us, the proceedings after the jury returned to give their verdict were conducted in the absence of a shorthand writer. The court, therefore, has no full record of what transpired from that moment until the completion of the trial. It has had to rely on the recollection of counsel and on a very abbreviated longhand note for an account of what took place. This is unfortunate and in the absence of an explanation is difficult to understand. Be that as it may, we were assured by both counsel that the jury were unable to agree on count 1 but were unanimous in returning a verdict of guilty on count 2. Inasmuch as the two counts were alternative, the chairman was justified in accepting a verdict on count 2 and in discharging the jury from returning a verdict on count 1. But were we obliged to quash the conviction on count 2 we clearly could not in these circumstances substitute an alternative verdict of guilty on count 1.

The chairman had previously properly rejected a submission of no case to answer on count 1. We were told, and the pattern of the chairman's summing-up supports this, that the case was fought on the basis, first, that if the jury believed a witness named Mrs Day, a conviction on count 1 could be justified, but that even if they rejected Mrs Day's evidence and acquitted on count 1 there was evidence to justify conviction on count 2 although the defence contended that the correct verdicts were verdicts of 'Not Guilty' on both counts. Mrs Day was admittedly an accomplice. There was little or no corroboration of her evidence save to the extent that the jury might find corroboration in certain lies told by the appellant to the police when he was first interviewed. But of course although there was evidence to justify conviction on count 2 such conviction could only be supported if there were a proper direction to the jury as to the law to be applied in relation to that count. Accordingly, the greater part of the argument before us was directed to seeking to show that the chairman's summing-up was in this respect incomplete and unsatisfactory.

Mrs Day changed her story between the first and the second days of the trial. The version of her evidence on which the Crown sought to rely was that the appellant was one of a number of men who had actually brought the stolen goods to her house which was called a chalet. Had the jury accepted this version of her story there would indeed have been abundant evidence to justify conviction on count 1 for on that story the appellant would plainly have been in possession of the stolen goods and would have received them dishonestly. The chairman properly warned the jury in the clearest terms of the dangers of accepting the evidence of an accomplice without corroboration and he equally properly told the jury what evidence there was which was capable of being corroboration, including some of the lies which we have mentioned. This part of the summing-up is not open to criticism. Having regard to Mrs Day's obvious prevarications it is not surprising that some of the jury at least felt doubts about count 1 and preferred to concentrate on count 2, since they could, if they saw fit, convict on count 2 on the appellant's own story in its original form without resting their decision in any way on Mrs Day's much criticised evidence.

The chairman sensibly dealt with the law by inviting the jury to examine the actual language of s 22 (1) of the Theft Act 1968 of which he gave them a copy. He read the subsection to them and explained it to them lucidly. His direction in relation to count 1 cannot be criticised but when he came to count 2 he read both the count and part only of the subsection. The former, as we have already mentioned, omitted

all reference to the words 'by or for the benefit of another person' and when the chairman read the relevant part of the subsection he too omitted all reference to those words although their presence in the subsection must have been obvious to him and indeed, in the circumstances, to the jury. It was argued before us that this omission constituted a serious misdirection or non-direction since it might have led the jury to conclude that assisting in the retention of the goods for the appellant's own benefit was enough to constitute an offence for the purpose of count 2 even if his actions in assisting that retention fell short of actual possession by him for the purposes of count 1. Reliance was placed on *R v Brown* (1). In that case this court decided that a mere failure to reveal the presence of stolen goods did not amount to dishonest assistance in their retention. It was therefore argued that in the present case the jury were entitled to receive but had not received a much fuller direction than they were given by the chairman regarding the law. But he was at some pains to tell the jury that a mere failure to inform the police or anyone else of the presence of stolen goods did not of itself constitute dishonest assistance in their retention. A more serious criticism is that in a passage immediately following this statement of the law, the chairman introduced the doctrine of recent possession which, with respect, had nothing to do with count 2, although it was, or at least might have been, relevant to count 1. If this topic had to be introduced at all, it should have been introduced earlier in the summing-up. In juxtaposition to a passage dealing with count 2, there may have been some confusion in the jury's mind as to its relevance. But even so the chairman at the end of this criticised passage made it plain that this doctrine had no relevance unless the appellant was in fact first shown to be in actual possession of the stolen goods, this being of course relevant only to count 1 and in no way to count 2.

The crucial issue is whether the omission in the summing-up of all reference to the words in s 22 (1) 'by or for the benefit of another person' is fatal to the conviction on count 2 especially in view of the omission of those words from count 2 itself. It was faintly argued before us that the words 'by or for the benefit of another person' did not govern 'retention' or 'removal' but only governed 'disposal or realisation' or possibly only 'realisation'. Both the grammar and punctuation of this part of sub-s (1) lead us unhesitatingly to reject this argument. It seems clear that the adverb 'dishonestly' governs both the verb 'undertakes' and the words 'assists in' and that the following four nouns namely 'retention', 'removal', 'disposal' and 'realisation' are in their turn all governed by the crucial words 'by or for the benefit of another person'.

We reach this conclusion purely as a matter of construction of s 22 (1). But we are fortified in that conclusion by the knowledge that our construction agrees with the view of Professor J C Smith in his admirable book *The Law of Theft*, 1965, p 160, para 605, where he states:

"The undertaking, assisting or arranging must be shown to be *for the benefit of another person*. If it were not for this qualification almost all thieves would be handlers as well."

It may be that this view leads to the conclusion that a man who innocently receives stolen goods but subsequently becomes aware or believes those goods to be stolen is not guilty of any criminal offence at least so long as he retains those goods himself. This was the law before the passing of the Theft Act 1968. But we see no reason to think that he does not in any event subsequently become guilty of an offence under the second part of the subsection if after he becomes aware of their stolen origin, he thereupon dishonestly undertakes or assists in their retention, removal, disposal or

(1) 133 JP 592; [1969] 3 All ER 198; [1970] 1 QB 105.

realisation by or for the benefit of another or if he arranges to do so. However, this question does not now arise for final decision and we only mention the point lest omission to do so might lead to a mistaken impression of the scope of our decision on the construction of this subsection.

Clearly therefore both the particulars in count 2 and the summing-up were defective, the former omitting the crucial words and the latter making no reference to them. As to the first point, we think it important that in future counts of this kind in indictments should include the words 'by or for the benefit of another person' where these are appropriate. The precedents in Archbold's Criminal Pleading, Evidence and Practice (37 edn., 1969, 6th cum. sup., para. 1560) can be followed and, where appropriate modified to this end. As to the latter, clearly it would have been better had the chairman's direction dealt with the point. But we cannot believe that the jury can have been under any misapprehension. Most of the text of s 22 (1) was read to them and they had the benefit of the chairman's explanation on that part which was read to them. The jury had the text of the whole subsection in front of them. If the appellant did dishonestly assist in the retention of these admittedly stolen goods, it was clearly for the benefit of Mrs Day and not for his own benefit. The evidence well justified the jury in taking the view that, even on his own story, what he did fell precisely within the plain language of the latter part of s 22 (1).

When the appellant was first interviewed by the police and was told that the police had information which led them to believe that he was concerned in the handling of certain stolen motor-cycling equipment, the appellant replied, 'I know nothing about any motor-cycling gear'. In the witness box he admitted that he knew about that motor-cycling gear. Indeed part of his defence was that he went and got some of it down from a loft and looked at it. Later on when the appellant was again interviewed by police officers he replied, 'I don't know what you are talking about. If you think I did it, you prove it'. Subsequently he was asked by the police:

'Q Do you know where the loft to the chalet is? A Yes, over the door.

'Q Have you ever been to it? A No.

'Q Do you know anything about two flags, one a Union Jack and the other a Woolworth's flag? A Yes, they're mine.

'Q Where did they come from? A I picked them up off the dust round in London I think.'

Later in the same interview the appellant said in answer to the question: 'How did your flags get there?', 'Ages ago but I don't know anything about the flags covering the boxes'. The following day in another interview the appellant said, 'I'll tell you what. I'll admit I know the stuff is there. I saw it and moved it under the flags out of the way'. Later on in the same interview he admitted that he knew that the stuff was 'probably nicked'. In a written statement he stated:

'I discovered the gear underneath one of my flags and looking in a few of the boxes realising that a married woman with two children have no call for it. So I left well alone knowing that it weren't nothing to do with me.'

We have quoted enough from the evidence to show that, as we have already said, there was abundant evidence to justify a conviction under the latter part of s 22 (1). We will only add that even if we had thought that the chairman's omission to deal completely with s 22 (1) might have had any consequences on the jury's mind this is a case in which we would not have hesitated to have applied the proviso to s 22 (1) of the Criminal Appeal Act 1968. For these reasons the appeal is dismissed.

*Appeal dismissed.*

Solicitors: Registrar of Criminal Appeals; T Hambrey Jones, Chelmsford.

T.R.F.B.



## COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, SALMON AND KARMINSKI, LJJ)

11th, 17th, June, 1971

Re GODDEN

*Police—Retirement—Compulsory retirement—Medical examination—Quasi-judicial function—Conformity with rules of natural justice.*

The applicant was a chief inspector of police who, in 1969, had been transferred from traffic to administrative duties. When the applicant complained of unfair treatment an enquiry was held by an outsider, Chief Constable Pratt, who reported that there had been no malpractice. The result of the enquiry, but none of the evidence before it, was shown to the applicant. In July, 1970, certain documents of an indecent nature were found in the applicant's desk, and as a result the deputy chief constable referred the applicant for an examination to the force's chief medical officer, B. On 23rd July, 1970, B, who was not a specialist but a general practitioner, interviewed the applicant, but he carried out no physical examination. His report, which stated, *inter alia*, that the applicant was suffering from a 'mental disorder of paranoid type', was submitted to the deputy chief constable, and on 31st July B certified the result of his interview with the applicant and stated that he should be placed on sick leave pending the report of a consultant psychiatrist. The applicant was put on sick leave, and soon afterwards was sent by his own doctor to be extensively examined by a distinguished consultant psychiatrist, H, who found the applicant to be in normal physical and mental health. His report was submitted to the police authority who then required the applicant to be examined by another doctor, P. P was supplied with the Pratt report and all documents annexed thereto, but at no time was either the applicant or H allowed to see it. On 22nd January, 1971, the police authority took steps compulsorily to retire the applicant, and in pursuance of the Police Pension Regulations, 1971, reg 70 (2), they referred the matter to B, who asked the applicant to attend for a further examination. The applicant refused to do so, whereupon the police authority, relying on reg 73 (a), said that they would make their own determination on such evidence and medical advice as they thought necessary. On an application for an order to prohibit the police authority from taking steps to retire the applicant and for mandamus ordering them to supply the applicant's medical advisers with all the evidence placed by them before B under reg 70,

**HELD:** the decision to be made by B under reg 70 (2) was quasi-judicial and must conform to the rules of natural justice, and, therefore, as he had previously formed an opinion as to the applicant's medical condition, he was disqualified from taking any further part in the matter; the applicant's medical adviser was entitled to have before him the same material as that seen by the police authority's medical officer; and the orders of prohibition and mandamus would issue.

**APPEAL** by the applicant, David George Godden, from a decision of the Divisional Court refusing his motions for orders prohibiting the Kent Police Authority from further proceeding to determine the question whether he was permanently disabled for the purpose of the Police Pensions Regulations 1971, and prohibiting Dr Crosbie Brown, the medical practitioner selected by the Kent Police Authority under the 1971 regulations, from considering the questions whether the applicant was disabled and the disablement was likely to be permanent, and for orders of mandamus directing the police authority to disclose to the applicant all reports and other similar documents which they had submitted to Dr Crosbie Brown when referring to him for decision the two questions above-mentioned, directing Dr Crosbie Brown to disclose to the applicant all reports and other documents sent to him by the police authority or the chief constable of Kent County Constabulary or someone on his behalf when the two questions were referred to him for decision, and directing the chief constable of



Kent County Constabulary to disclose all reports and other documents which he had sent or caused to be sent to either the police authority or to Dr Crosbie Brown.

*B H Anns* for the applicant.

*R A W Sears* for the respondents.

**LORD DENNING, MR:** Chief Inspector Godden joined the police force in Kent in 1950. He did exceedingly well. In 1967 he attained the rank of chief inspector. He was put in charge of a traffic area at Seabrook near Folkestone. But then there were some incidents as a result of which in 1969 he was transferred to administrative duties at Canterbury. In short an office job. He felt that this transfer was a slur on him. He thought that he had been unjustly treated. He and his wife made accusations against his superiors. His wife in particular wrote to many persons in high positions. In consequence an enquiry was held by Mr Pratt, then the chief constable of the Bedfordshire and Luton Constabulary. After hearing many witnesses, Mr Pratt, on 18th May 1970, reported that there was no evidence of malpractices or criminal activity by a member of the Kent County Constabulary. Chief Inspector Godden was not shown any of the papers in respect of that enquiry. He was only told the result.

The next incident was on 4th July 1970. A senior police officer went to search the desk used by Chief Inspector Godden. He unlocked the desk. There were in it two documents: one, a magazine called 'Classics of Erotica'; and the other a long draft letter to a newspaper written as if by a young woman to an editor. It was most indecent. It detailed perversions such as whipping. It is said to be in the chief inspector's writing, but that it is not admitted by him. These documents were put before the deputy chief constable, Mr Haslam, who said:

'I was of the opinion, after the finding of the letter and magazine in the [chief inspector's] desk that he was mentally unstable and that he should no longer continue to carry out the duties of a police officer when in such a condition. It was arranged for the [chief inspector] to be seen by the Chief Medical Officer of the Force—Dr. Crosbie Brown.

In consequence Dr Crosbie Brown, the chief medical officer, saw him on 23rd July 1970. Chief Inspector Godden said the interview only lasted about 12 minutes; and there was no physical examination of him at all. He and the doctor just talked together. We have been supplied with a copy of a report made by Dr Crosbie Brown after the interview. But it was not before the Divisional Court. Dr Crosbie Brown said in it:

'I interviewed Chief Inspector Godden at Canterbury Police Station on 23rd July 1970 at 3 p.m. I have read the report by H. R. Pratt Esq. I have read the statements and the attachments relating to Chief Inspector Godden. After reading the reports I formed the opinion that Godden is suffering from a mental disorder of paranoid type.'

There follow two paragraphs in which the doctor says that Chief Inspector Godden was composed and showed no evidence of anxiety. The report adds:

'I saw no useful purpose in referring to the magazine Erotica which was found in his desk, or to the story of flagellation said to have been written by him.'

That report was sent to the deputy chief constable, Mr Halsam. He read it and a week later made this note on it:

'30/7/70. Spoke to Dr. Brown who agreed that in the circumstances it would be

reasonable for Chief Inspector Godden to be placed on sick leave until consultant's report is received. Necessary instructions sent to East Kent District.'

The very next day, on July 31 1970, Dr Crosbie Brown gave his certificate in these words:

'Certificate of Unfitness for Police Duty

Chief Inspector David George GODDEN

'I have considered the history of the above named and saw him on 23rd July, 1970.

'I formed the opinion that he is suffering from a mental disorder of paranoid type and that he should be placed on sick leave until the report of the consultant psychiatrist is received, when further consideration can be given to the matter.'

That certificate was of great importance to the chief inspector. It meant that he was taken off duty and put on sick leave. As it happened, Chief Inspector Godden was on annual leave at the time. He was told that he had been put on sick leave, and he has been on sick leave ever since. He has not been on duty at all. Naturally enough, Chief Inspector Godden was very disturbed. Within a few days he saw his own doctor, who sent him to a distinguished consultant psychiatrist, Dr Hordern of King's College Hospital in London. Dr Hordern examined him carefully. He saw both him and his wife. He had all sorts of tests made. He found nothing wrong with the chief inspector at all. He wrote reports in August 1970 and later on in May 1971. He concluded: 'It is my opinion that he is normal psychiatrically and in good mental and physical health.' But nevertheless the Kent police authorities were not satisfied. They asked Chief Inspector Godden to be examined by a Dr Pollitt. He and his wife went there but they came away most dissatisfied. It appears that the police authorities had supplied the doctor with the Pratt report and all the documents annexed to it, but they stipulated that Chief Inspector Godden was not to see it. They would not even allow his own medical adviser, Dr Hordern, to see it. On this matter Dr Hordern made this comment:

'I understand that Drs. Crosbie Brown and J. D. Pollitt have formed diagnostic impressions on Chief Inspector Godden that differ from my own, and also that they have been supplied with information on his case that I have not had a chance to see. It may be that this information has played a part in the conclusions they have reached, and if this is indeed so I would appreciate the opportunity of scrutinizing the information and confronting Chief Inspector Godden with it so as to observe and to record his reactions.'

That raises the crucial point: Should Dr Hordern, the chief inspector's own medical consultant be at liberty to see the Pratt report and other material? The police doctors have seen it, but not Dr Hordern.

To go on with the story. On 22nd January 1971 the Kent Police Authority took steps compulsorily to retire him on the ground of ill-health. Regulation 70 (2) of the Police Pensions Regulations 1971 provides:

'Where the police authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions:—(a) whether the person concerned is disabled; (b) whether the disablement is likely to be permanent . . .'

The next regulation, reg 71, states that if the decision goes against the police officer, he can appeal to a medical referee to be appointed by the Home Secretary. If he is

found to be permanently disabled, the police authority have power to require him to retire on the ground that he is permanently disabled for performance of his duties.

On 22nd January 1971 the police authorities referred the matter to Dr Crosbie Brown. He was the very doctor who had previously examined the chief inspector and said he was suffering from mental disorder. They wrote to Chief Inspector Godden stating:

'The police authority have selected Dr. R. Crosbie Brown . . . as their medical practitioner for the above purpose [that is to say, to see whether he was disabled and likely to be permanently disabled] and you are required to submit yourself to such medical examination or to attend such interviews as Dr. Crosbie Brown may consider necessary . . .'

Thereupon Dr Crosbie Brown required Chief Inspector Godden to attend the surgery of a Dr Hierons. Chief Inspector Godden did not attend that appointment. His legal adviser told him not to do so. They gave that advice because he and his doctor had not been allowed to see the Pratt report or the material which had been presented to the doctors by the Kent Police Authority.

Seeing that Chief Inspector Godden did not attend the appointment with Dr Hierons, the police authority said that he was disobeying reg 73 (a) of the 1971 regulations, in that 'he was wilfully or negligently' refusing to submit himself to medical examination. They said that they would make their own determination on such evidence and medical advice as they thought necessary.

In view of that intimation, Chief Inspector Godden by his legal advisers made application to the Divisional Court for an order of prohibition. They sought to prohibit the police authority from taking steps compulsorily to retire him. The Divisional Court dismissed the application. They had not nearly as much material as we have. LORD WIDGERY CJ seems to have regarded the enquiry as a matter between doctor and patient. He said that you could not expect a doctor to disclose to his patient, especially in a mental or psychiatric matter, all the reports which were before him. Now we have more. We have, in particular, this report of 23rd July 1970. It was not disclosed until the day before the hearing in this court. It makes a lot of difference.

I am clearly of opinion that the decisions leading to compulsory retirement are of a judicial character and must conform to the rules of natural justice. They are, first, the decision by the medical practitioner or on appeal by the medical referee, and, secondly, the enquiry by the police authority themselves. We have been referred to two cases where medical certificates were required which affected the rights of individuals. One is *R v Postmaster General, ex parte Carmichael* (1). The other is *R v Boycott, ex parte Keasley* (2). In each of those cases certiorari was granted. When a medical practitioner is making a decision which may lead to a man being compulsorily retired, he must act fairly. He is not acting simply as doctor to patient. He is not diagnosing illness or prescribing treatment. He is not saying merely whether a man is fit or unfit for duty. He is doing something which affects the man's whole future.

Take this very case. A man's mental state is at issue. It affects not only his pension rights and payments to him. It affects his standing in the community, his ability to get other work, and the like. It is quite plain to me that the person concerned is

(1) 91 JP 43; [1928] 1 KB 291.

(2) [1939] 2 All ER 626; [1939] 2 KB 651.

entitled to have a fair opportunity of correcting or contradicting any statements made to his prejudice, and a fair opportunity of calling in his own medical consultant and getting him to give his opinion to the deciding person. His own medical consultant should be entitled to have before him all the material which the other doctors have.

That brings me to the first question: Was it proper for the Kent police authorities to refer for decision this question to Dr Crosbie Brown? I must say I think it was not. Dr Crosbie Brown was disqualified from acting. He had already expressed an opinion adverse to Chief Inspector Godden. As early as 23rd July 1970, Dr Crosbie Brown had said that the chief inspector was suffering from a mental disorder. Dr Crosbie Brown acted on that opinion by putting him on sick leave. He put his opinion on affidavit. He committed himself to a view in advance of the enquiry. I think it would be impossible for Dr Crosbie Brown—who is just a general medical practitioner and not a consultant—to bring a completely impartial mind to bear on the matter. In any event, to the person affected by it, Chief Inspector Godden, it must inevitably appear that Dr Crosbie Brown cannot bring an impartial judgment to bear on the matter. If he was to decide the matter, justice would not be seen to be done. In view of the additional material before us (which was not before the Divisional Court) I hold that Dr Crosbie Brown is disqualified. For that reason in my opinion the first request for prohibition should go 'to prohibit Dr. Crosbie Brown from determining whether Chief Inspector Godden was permanently disabled within the Police Pensions Regulations from being in the force.

If the police authority determine further to consider the matter, they should refer it for decision to somebody else. I would suggest that it would be better to have some one quite outside this case altogether—not even any of the names which have been mentioned, such as Dr Pollitt or Dr Hierons—but some duly qualified medical practitioner who has had no part in the case hitherto. Then the question arises: What material may or should be put before such a person? Is it to include the Pratt report and all such other matters? I am inclined to think it should. Whoever is entrusted with the decision should have before him all material relative to the state of mind of Chief Inspector Godden, whether it is for him or against him.

The next question is whether Chief Inspector Godden's own medical advisers should see the material. In my opinion they should. Dr Hordern, or whatever medical consultant Chief Inspector Godden engages, should have the selfsame material before him on which to give his opinion as that which is placed before any other doctor who is considering the matter.

One word more. Although the medical advisers on each side should be fully informed, I do not see that justice requires that Chief Inspector Godden should himself be able to roam through this Pratt report. One does not want to keep anything back from him, but in a matter of this kind it seems to me that justice can well be done by his own consultant seeing it. No doubt his own consultant will have to ask him many questions on it, and he is bound to get to know a good deal about it. But for myself I do not see that justice requires that Chief Inspector Godden should see it all himself. I do not suggest that he would use it as a basis for an action for libel, but it would be most deplorable if it were used for that purpose. Rather than risk such a thing, it seems to me justice can fairly be done by letting his medical consultant see everything that any other doctor sees on the matter and give his advice accordingly. I would therefore issue an order of mandamus to the police authority telling them that, if at any time consideration is given as to whether Chief Inspector Godden is permanently disabled within the Police Pensions Regulations 1971, they should supply to the medical consultant of Chief Inspector Godden all letters and other material which is placed by them before any duly qualified practitioner

selected by them under reg 70 of the Police Pensions Regulations 1971. I would therefore allow the appeal and let prohibition and mandamus issue in the terms which I have stated.

**SALMON LJ:** I agree and add a word only because we are differing from the Divisional Court. First of all, having regard to certain allegations that have been made, I would like to make it plain that I do not say one word and I hope that this decision will not be considered as any criticism at any time, against Dr Crosbie Brown or any officer of the Kent County Constabulary or the Kent Police Authority. We are differing from the Divisional Court, but we have the advantage of having a good deal of material before us which they did not see. Moreover, I have the impression that in this court the case has been rather differently put from the way in which it was put below.

The first matter and the matter of real importance turns on the true effect of reg 70 (2) of the Police Pensions Regulations 1971, which LORD DENNING MR has read and which I do not propose to repeat. It seems to me that the duly qualified medical practitioner selected by the authority to give a decision whether a police officer is disabled, and, if so, whether the disablement is likely to be permanent, is undoubtedly performing a quasi-judicial function in reaching that decision. The relationship between him and the officer concerned is not an ordinary relationship of patient and doctor. When I say he is exercising a quasi-judicial function, I certainly do not mean that he should conduct anything in the nature of a trial or hear the officer's legal advisers, nor that he is bound by the rules of evidence. He must, however, act fairly. As I have said, I do not intend in any way to criticise Dr Crosbie Brown, but the decision which would have to be taken on the reference that was made to him on 22nd January 1971 and indeed many decisions under these regulations to which I have referred, are of the very greatest importance to the individual officer concerned. This is particularly true when, as in this case, the question is whether the officer is suffering from mental disorder. If the medical practitioner appointed under the regulations decides, for example, that an officer is suffering from mental disorder of a paranoid type, it is difficult to think of anything which could be more damaging to the officer. This, of course, must not cause the medical practitioner to shrink from the decision if, on all the facts before him and after a careful examination, he comes to the conclusion that unfortunately the officer is suffering from such a disability. I say that it is of the greatest importance to the officer, because obviously it means that he is going to be retired from the police force before his time. If he is so retired, he will suffer loss, and in some cases—and this I believe is one of them—very serious financial loss. It has been said: Well, this decision is not of that importance because, under reg. 86, even if the decision is made against the officer, it is always for the police authority to determine whether or not the officer shall be retired. It is quite true that there is an overriding discretion residing in the police authority. I find it very difficult to believe, however, that any police authority, let alone the Kent Police Authority, would decide to retain a man for any sort of police duties if he were indeed suffering mental disorder of a paranoid kind. Moreover, if a man is compulsorily retired on that ground, whatever his own doctor may say it would take a very sanguine prospective employer to offer him any further employment. It seems to me, therefore, that it is important to emphasise that the medical practitioner in exercising powers under reg 70 is acting in a quasi-judicial capacity. If Dr Crosbie Brown is to conduct the enquiry and reach a decision under reg 70, he would be put in an impossible position, and I have no doubt that he will be extremely glad to be relieved of it. As long ago as 23rd July 1970, after reading certain reports that were put before him, he formed the opinion, according to his own memorandum, that

Chief Inspector Godden was suffering from mental disorder of a paranoid type. That was before he ever saw the chief inspector. Having seen him, it is fair to point out that he says very plainly that he was unable to obtain any information from the chief inspector or any corroboration from examining him to support the opinion which he had previously formed. Nevertheless, he still held that opinion, as he was perfectly entitled to do; and indeed he swore an affidavit in these proceedings stating in terms that he had formed that opinion. I do not think that it would be fair to Dr Crosbie Brown to ask him to conduct what is in effect a quasi-judicial enquiry to decide the very question about which he had formed a firm view nearly a year ago. Moreover, justice would not be seen to be done; because the chief inspector would no doubt say: 'This man has already made up his mind. Moreover, he made it up without seeing me. It would be unfair that he should now be asked to decide the question afresh and quite impartially—a question which is vital to me—in circumstances such as these.' I therefore entirely agree with LORD DENNING MR. Perhaps at the risk of repetition, I do not say this as indicating any criticism of Dr Crosbie Brown. I agree that a writ of prohibition should go so that he will be relieved of what I am sure would be the most invidious task of having to exercise the duties imposed by reg 70 (2).

The Kent Police Authority have the power of selecting the medical practitioner who shall carry out the enquiry if they decide to refer this question for decision to a medical practitioner. I feel confident, however, that, on reflection, they will agree, as I entirely agree, with what has fallen from LORD DENNING MR that, having regard to all that has gone before, it would be far better not to appoint either of the distinguished consultants who have been selected by the police authority heretofore. It would be far better if they were to appoint some entirely independent medical practitioner—not that I am suggesting that the others are not independent—but they should appoint some entirely new medical practitioner who will be able to come to this question with an entirely fresh mind. If I may be forgiven for suggesting it, it would seem that, as this is a question which concerns the officer's mental health, it would be very sensible to appoint a first class psychiatrist rather than a general practitioner to make the decision. It is most important for the police authority that the right decision should be reached.

It has been, as one would expect, fairly conceded on behalf of the police authority that when a medical practitioner whom they appoint under reg 70 comes to consider his decision he should carefully examine the opinion of any medical specialist whom the chief inspector consults and not only consider his opinion, but consult with him, should their opinions in the first instance differ. This is the concession which, as I understand it, has been very properly made. The medical specialist who has attended the chief inspector is Dr Hordern. I think the order must cover any medical specialist, because Dr Hordern may be indisposed or out of the country—one knows not—at the time the enquiry is held. Once it is conceded that it is only fair to consider the views of the chief inspector's medical specialist it seems to me to follow as night follows day that it is only fair that the material put before him should include all the material which is put before whoever is appointed under reg 70 and whoever such a medical practitioner consults; the medical practitioner selected under reg 70 is obviously entitled to take the views of anyone he likes in the medical profession. It is only fair that all the material which is put before them as being relevant to the chief inspector's mental condition should be made available to Dr Hordern or any other medical specialist whom Chief Inspector Godden consults.

For these reasons I agree that this appeal should be allowed and with the order proposed by LORD DENNING MR.



**KARMINSKI LJ:** I also agree, and desire to say only this. Dr Crosbie Brown has been put, through no fault of his own, in a difficult and delicate position. About a year ago he enquired into the position so far as Chief Inspector Godden's health was concerned, and the opinion he formed was adverse to the inspector's health. He has now, a year later, been asked to hold, another enquiry—an enquiry which, as LORD DENNING MR and SALMON LJ have pointed out, requires the exercise of at any rate judicial functions. In other words, he has to enquire and to reach a decision. In those circumstances it would be almost impossible for Dr Crosbie Brown to be wholly impartial. I do not use those words in an unkind or critical sense. He formed a view a year ago, and it would require perhaps superhuman qualities if he were able to expunge altogether from his mind what he heard last time and the reasons for which he came to the conclusion that he reached. In fact, other matters have since emerged and it is in my view essential that the enquiry should be held by another duly qualified medical practitioner.

I would like to express my complete agreement with what has been said by SALMON LJ, that it is vital to get a quite different medical practitioner to deal with this matter—preferably a consultant psychiatrist, since the problems here are primarily whether or not the chief inspector is suffering from a mental illness or not. The importance to him and to any police officer in his position is very great, and I too would suggest that it would be far better to find a consultant psychiatrist who not only has had no concern with the present enquiry, but also is one who does not come from the area of the Kent Police Authority. I say that again with no adverse criticism of anybody; but it would perhaps be even better if the new medical practitioner selected is one who has no connection of any kind with the county of Kent. The appeal should be allowed.

*Orders for prohibition and mandamus.*

Solicitors: Worthington-Edridge, Hulme & Court, Folkestone; Sharpe, Pritchard & Co.

P.P.

CHANCERY DIVISION

(GOULDING, J)

27th, 28th April 1971

ATTORNEY-GENERAL v SHONLEIGH NOMINEES LTD

*Right of Way—Land sold by Secretary for Air—Conveyance of land 'freed from rights'—Application to rights of way—Defence Act, 1942, s 14.*

By s 14 of the Defence Act, 1842, a purchaser from a Defence Ministry of property previously compulsorily purchased by them is deemed to stand seised and possessed of the property freed and absolutely discharged of and from all "manner of . . . rights . . . which can or may be . . . set up . . . in respect of the" purchased property.

Before 1939 a right of way crossed land at T.M. farm. In September, 1939, war was declared between Great Britain and Germany. Early in the war the defence authorities took possession of T.M. farm and constructed an aerodrome there, the right of way being stopped up in 1942. In 1943 the Secretary of State for Air bought the farm from the then owner to be held by him in fee simple on behalf of the Crown. In 1959 the Secretary for Air sold the greater part of the farm to the predecessors in title of the defendant company, the right of way being over part of the land then conveyed.

HELD: the provision in s 14 that the purchaser of land from the defence authorities should be deemed to stand seised of it freed from all 'rights' did not extend to a right of way, and the Attorney-General was entitled to a declaration that the right of way in the present case had not been extinguished, but enured for the benefit of the public.

ADJOURNED SUMMONS by which the Attorney-General sought a declaration that any rights of the public to use as a highway a roadway or track formerly crossing the land of the defendants, Shonleigh Nominees Ltd, at Thruxton in Hampshire, were still exercisable.

*J Bradburn* for the plaintiff.

*M J Fox QC* and *M Miller* for the defendants.

**GOULDING J:** Before the second world war an unmetalled road or track was shown on the ordnance survey map as crossing the land at Thruxton Manor Farm near Andover. I shall refer to that unmetalled road or track as 'the road', but it is to be understood that I am not making any assumptions either as to the physical condition of the road before the war, as to its precise course on the ground, or as to the private or public rights of way, if any, which may have existed over it. Speaking of its position generally, the road ran in a north-westerly direction from the main road, that is, the road which links Andover to Amesbury, passing a building or buildings on the farm called 'New Barn'.

Early in the war the defence authorities took possession of Thruxton Manor Farm. In 1941 an aerodrome was opened there. It was occupied first by the Royal Air Force and later by the United States Air Force. That occupation continued until the year 1946. During the period of occupation by the Air Force the Secretary of State for Air bought the farm by a conveyance dated 9th October 1943. The farm was conveyed for a consideration of £15,000 by the then owner, Miss Couchman, to the Secretary of State for Air, to be held by him in fee simple on behalf of the Crown.

It is not in dispute that if before the war the road was a public highway it was stopped up by an order made under the Defence Regulations. That order was dated 11th May 1942. It is also common ground that that order cannot as such have had effect in law later than 31st December 1960. A little earlier than that, namely in the year 1958, the greater part of the farm was sold to predecessors in title of the defendant company by the Secretary of State for Air for the sum of £27,600, and that

sale was completed by a conveyance in fee simple dated 2nd September 1959 and made between the Secretary of State for Air as vendor and Thruxton Investments Ltd, who are predecessors in title of the present defendant company, as purchaser.

The property comprised in the sale was identified by reference to a plan annexed to the conveyance. The plan shows only a part of the road, namely, the south-easterly part. That part had been preserved or improved as an entrance way into the aerodrome from the main road. The first hundred yards, or a little more, of the entrance way are coloured brown on the plan. They were included in the land conveyed and were expressed to be subject to a right of way for the owner or occupier of an adjacent part of the farm which had been sold by the Air Ministry to a different purchaser. Except for that reference, the conveyance of 1959 does not mention any rights, public or private, over the road.

It is now asserted in the neighbourhood that before the war the road was a public highway, and in 1968 at least one member of the public sought to use it as a public highway and his attempt was successfully resisted. That controversy having arisen, on 16th April 1969 the originating summons which is now before me was issued by the highway authority, the Hampshire County Council. The defendants are Shonleigh Nominees Ltd, a company which claims to be the equitable owner of the farm under a purchase not yet completed by conveyance and is already in possession of the land.

The relief sought by the originating summons is as follows:

'A declaration upon the true construction of the Defence Act 1842 or otherwise that in the events that have happened all or any rights of the public to use as a highway a roadway or track formerly crossing the land of the defendant company at Thruxton in Hampshire known or formerly known as Thruxton Airfield are still exercisable.'

The defendant company sought the summary dismissal of that application by the highway authority on two grounds. First, it said that it, the defendant company, denied that a public right of way had ever existed over the road. Accordingly, in the defendants' contention the question raised by the originating summons was merely a hypothetical one and on well-known principles ought not to occupy the time of the court. The alternative objection of the defendants was that the highway authority had no title to assert a public right of way, except through Her Majesty's Attorney-General. Those objections came in due course before PLOWMAN J. He rejected the first of them, taking the view in the exercise of his discretion that the points raised by the summons could conveniently, and should, be decided in effect as a preliminary question of law before the issue, whether a public right of way had ever existed, was brought to decision. However, the learned judge upheld the second objection. The Attorney-General has given his fiat and has been added to the proceedings as plaintiff, so that they are now well constituted, and the second objection was removed in that way.

It is common ground between the parties that the conveyance of 1959, to which I have referred, is one to which s 14 of the Defence Act 1842 applies. The question to be decided is whether on a true application of that section the conveyance extinguished any public right of way over the road which may have existed.

It will be convenient if I read some of the provisions of the Act of 1842. It is described in the long title as—

'An Act to consolidate and amend the laws relating to the services of the Ordnance Department, and the vesting and purchase of lands and hereditaments for those services, and for the defence and security of the Realm.'

It recites four earlier statutes respectively of the years 1804, 1821, 1822 and 1832, and recites further that 'it will be expedient to consolidate and embody in one Act the powers and provisions of the said several Acts, and to amend and enlarge the same'. It is apparent, therefore, that the Act of 1842 was a consolidating Act but was also an Act that introduced amendments in the law. Counsel at my request have examined the earlier Acts referred to in the preamble to the Act of 1842 and certain further Acts referred to in those earlier Acts, so that I have been informed of the legislative history of the material sections. I will say at once that I am greatly indebted to counsel for the performance of that task.

The first four sections of the Act of 1842 deal with the repeal, with necessary savings, of the earlier Acts. The next four sections, ss 5 to 8, deal with the vesting of military lands in the principal officers of the Ordnance or otherwise on behalf of the Crown. Section 9 gives a power of purchase:

'it shall be lawful for the said principal officers for the time being of Her Majesty's Ordnance from time to time to contract for and purchase, for and on behalf of Her Majesty, . . . any messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, or hereditaments, or to take or purchase any lease of the same which shall in their judgment be desirable to be purchased, for and on behalf of the said ordnance or barrack services, or the defence of the Realm, upon such terms as to the said principal officers shall seem meet, and to enter into any contracts necessary for that purpose . . .'

Section 10 gives an enabling power to corporations, limited owners, and so on, to sell lands for military purposes. Section 11 provides for automatic vesting on the death or resignation of any of the principal officers of the ordnance.

Then comes s 12 which gives a power to dispose of unwanted military lands in these terms:

'save and except as herein-after is mentioned, it shall and may be lawful for the said principal officers for the time being to sell, exchange, or in any manner dispose of, or to let or demise any of the messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements or hereditaments respectively, which shall be vested in them under and by virtue of this present Act with their respective appurtenances, either by public auction or private contract; and to convey, . . . assign, or make over, or to grant or demise the same respectively (as the case may require), to any person or persons who shall be willing to purchase or take the same in exchange or otherwise respectively, and also to do any other act, matter, or thing in relation to any such messuages, buildings, castles, forts, lines or other fortifications, manors, lands, tenements, and hereditaments, which shall by the said principal officers be deemed beneficial to the public service, in relation thereto, or for the better management thereof, which might be done by any person having a like interest in any such like messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, or hereditaments: Provided always, that nothing in this Act contained shall be construed to give to the said principal officers of Her Majesty's Ordnance for the time being a greater or better estate in the said messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, and hereditaments, or any of them, than was vested in Her Majesty, or in the person or persons holding the same in trust for Her Majesty, at the time of the passing of this Act.'

Section 13 provides for payment and receipt of purchase money when the powers of s 12 are exercised. Then comes the vital group of sections round which for the most part the argument has turned, ss 14, 15, 16 and 17, and I will read them in order.

## Section 14 provides:

'immediately from and after the payment of such purchase money, and the execution of every such conveyance, . . . and assignment as aforesaid, the purchaser or purchasers therein named or the person or persons making such exchange as aforesaid, shall be deemed and adjudged to stand seised and possessed of the messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, and hereditaments, which shall be so purchased or taken in exchange by, and conveyed . . . assigned, or made over to him, her, or them respectively, and notwithstanding any defect in the title of the said principal officers thereto, freed and absolutely discharged of and from all and all manner of prior estates, leases, rights, titles, interests, charges, incumbrances, claims, and demands whatsoever, which can or may be had, made, or set up in, to, out of, or upon or in respect of the same messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, and hereditaments, by any person or persons whomsoever on any account whatever (save and except such estates, leases, rights, titles, interests, charges, incumbrances, claims, and demands whatsoever, as in any such conveyance, . . . deed of exchange, or assignment shall be excepted).'

## Section 15 provides:

'Provided always, . . . that in case any person or persons shall have any just and legal or equitable right to any of the messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, and hereditaments, which shall be so sold, exchanged, and conveyed as aforesaid, or to any part or parts thereof, or to any charge, incumbrance, or demand affecting the same, and not being under any of the disabilities herein-after mentioned, and shall within five years next after such right shall by law or equity accrue to or become vested in him, her, or them respectively, . . . persons within the age of twenty-one years, or out of the Realm, or not of whole mind, at the time of such sale, exchange, and conveyance as aforesaid shall, with five years next after they shall respectively come and be . . . at the age of twenty-one years, out of prison, within this land, or of whole mind, make out and establish such right or claim to the satisfaction of the said principal officers, then and in such case the principal officers shall make or cause to be made a fair and reasonable compensation or satisfaction for every such right and claim so made out and established as aforesaid. But such compensation or satisfaction shall not in any case exceed the amount of the purchase money or purchase monies which shall have been paid to and received by the said principal officers for messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, and hereditaments in respect whereof such right or claim shall be so made out as aforesaid, or a proportional part thereof, exclusive of the value of any buildings or improvements which shall have been erected or made thereon for the use of the said Ordnance or Barrack Departments, or for the defence of the Realm.'

## Section 16 provides:

'it shall be lawful for the principal officers of Her Majesty's Ordnance for the time being to enter on, survey, and mark out, or to cause to be surveyed and marked out, any lands, buildings, or other hereditaments or easements wanted for the service of the Ordnance Department or for the defence of the Realm, or to stop up or divert any public or private footpaths or bridle-roads, and to treat and agree with the owner or owners of such lands, buildings, hereditaments, or

easements, or with any person or persons interested therein, either for the absolute purchase thereof, or for the possession or use thereof during such time as the exigence of the public service shall require.'

Section 17 provides:

'Provided always . . . that whenever any footpath or bridle-road shall be stopped up as aforesaid, another path or road shall be provided and made in lieu thereof respectively, at the expense of the Ordnance Department, and at such convenient distance therefrom as to the principal officers of Her Majesty's Ordnance for the time being shall seem proper and necessary.'

The rest of the Act of 1842 deals with the machinery of purchase, either compulsory or by agreement, and with ancillary matters, and no special argument was founded on it.

Going back to s 14 again, the scheme of the section is that a purchaser from the military authorities is to be—

'deemed and adjudged to stand seised and possessed of the [purchased property], notwithstanding any defect in the title of the [military authorities] freed and absolutely discharged of and from all and all manner of prior estates, leases, rights, titles, interests, charges, incumbrances, claims, and demands whatsoever which can or may be had, made, or set up in, to, out of, or upon or in respect of the [purchased property] by any person or persons whomsoever on any account whatever (save and except such estates, leases, rights, titles, interests, charges incumbrances, claims, and demands whatsoever, as in any such conveyance, . . . , deed of exchange, or assignment shall be excepted)'

by the instrument of conveyance.

I will refer first to the words 'notwithstanding any defect in the title of the said principal officers thereto'. Those words did not appear in s 14 when that section and the associated s 15 were first enacted by the Act of 1821, to which I have referred. In that Act ss 6 and 7 correspond with what are ss 14 and 15 in the Act of 1842, but, as I have said, the reference to defects of title does not appear.

When the land, formerly Thruxton Manor Farm, and then the aerodrome, was sold by the Air Ministry in 1959 it was still being used for flying purposes and it was expressly sold as an aerodrome capable of civilian use. At the time of sale the greater part of the road had been destroyed and was not apparent on the ground. In law any public right of way remained suspended by the order of 1942. In those circumstances the latent public right, if it ever existed, would properly be described as a defect of the title of the Secretary of State for Air. Authority for that proposition can be found in the judgment of SARGANT J in *Yandle & Sons v Sutton* (1).

Counsel for the defendants submit that s 14 in its present form—and even, I think they would say, without the added words relating to defects of title, but certainly with those words—is couched in the widest language to cure any defect of title whatever which might exist on the part of the selling military authorities. They say that a conveyance on purchase discharges the land, among other things, from all manner of prior rights and claims which can be made or set up by any person or persons whomsoever. A public right of way, they contend, is a right which any person may set up by taking the appropriate step of relation to the Attorney-General. It is a claim which the Attorney-General may make with or without a relator.

It is common ground that there was no exception saving any public right of way in the conveyance of 1959. Therefore, it is submitted for the defendant company

(1) [1922] ChD 199; [1922] All ER Rep 425.



that the express language of s 14 has abolished any public right of way over the road which may ever have existed. Counsel for the defendants say that the language of s 14 in that behalf is clear and free from ambiguity and must be given its natural meaning in accordance with the principles stated by LORD HALDANE in the case of *Watney, Combe, Reid & Co v Berners* (1).

Counsel for the defendants also say, and correctly, that a statute can abrogate a public right of way if Parliament thinks fit without providing an alternative road or any other form of compensation. They go further, still correctly, and say that Parliament can bring about such a result, without expressly referring to any public right of way, by necessary implication from the terms of the Act. They point to *Yarmouth Corp v Simmons* (2) as an example of the extinguishment of a public right of way by necessary implication from legislative provisions.

Counsel for the plaintiff denies the proposition that the words of s 14 in their natural meaning include public rights of way. He points out that the word 'rights', stands in a strongly proprietary context, 'all and all manner of prior estates, leases, rights, titles, interests, charges, incumbrances, claims, and demands'. Looking at the birds in that flock, he says that the words 'rights', or 'claims' is really not apt to have such a wide extension as to include rights of the general public. Counsel says further that the same result follows from a consideration of the words describing 'estates, leases, rights, titles, interests, charges, incumbrances, claims, and demands whatsoever which can or may be had, made, or set up . . . by any person or persons whomsoever'. There again, counsel says, the words are such as to suggest a proprietary right vested in some person, either individual or corporate, and not a right of the general public at large.

In my judgment if one reads s 14 in isolation, it is probable that the draftsman intended to refer only to proprietary rights and not to rights of the general public. Certainly I am of opinion that the natural meaning of s 14 considered alone does not plainly extend to public rights. Counsel for the plaintiff goes further. He says that if, as I have held, s 14 in its own language is not decisive, then the plaintiff can derive help from an examination of other parts of the Act of 1842. First, he says, the words 'Person or persons' where they occur in other sections, as for example in s 12, clearly relate to individual or corporate persons and cannot include the general public. I do not for my part find that argument of any cogency.

Secondly, counsel for the plaintiff points to s 15, i.e. the section forming the proviso engrafted on s 14, which provides compensation for a person or persons who may have a right that has been extinguished by s 14. If such a person or persons establishes or establish the right to the satisfaction of the military authorities within five years after the accrual thereof, or within five years after being freed from disability, if that is later, then they can have compensation. A study of s 15 suggests that its language may not be entirely adapted to its intention. I can conceive of a number of questions which might arise on it. But counsel for the plaintiff at any rate says that it provides a scheme of compensation for rights extinguished under s 14 in terms that could not possibly extend to a general public right like a right of way. Counsel for the defendants, in answer to that, points out that the language of s 15 is not at all closely correlated with that of s 14 and there is no presumption that s 15 will extend to all the cases which are covered by s 14. That is true, but nevertheless, in my judgment, there is some force in this particular point of counsel for the plaintiff, and the fact that s 15 is only dealing with proprietary rights at least encourages one to think that s 14 may be the same.

(1) 79 JP 497; [1915] AC 885.

(2) (1878), 10 ChD 518.

Thirdly, and lastly, counsel for the plaintiff relies on the provisions relating to public or private rights of way in ss 16 and 17. The history of those sections is that the greater part of s 16, which deals with the surveying and marking out of lands and agreeing the purchase of lands, was s 3 of the Act of 1804, the earliest of the Acts recited in the Act of 1842. However, that section did not refer to rights of way, and the small part of s 16 which does so refer, together with the whole of s 17, appear as a new provision in the Defence Act 1842. Counsel for the plaintiff points out that in the Act of 1842 those sections require an alternative way to be provided if the public or private way is stopped up. Moreover, the sections only extend to footpaths and bridle-roads, and when it was desired in the Defence Act 1860 to make a similar provision which would extend to carriage roads, it was necessary to do so by additional enactment, i.e. s 40 of the Defence Act 1860, which extended to any highway and also to sewers and drains. But that section of the Defence Act 1860 was of temporary operation only and it is long since spent. What counsel for the plaintiff's argument amounts to is this, that in the Defence Act 1842 Parliament dealt carefully and tenderly with public rights of way which might be stopped up during the time of military occupation. It may be thought unlikely that by a side wind, and without express language, Parliament would have authorised their destruction without any provision of an alternative way by conveyance to a private owner when the military lands were found superfluous. That point in my judgment is also a valid one, and on the whole matter I think the Attorney-General's argument must succeed.

*Declaration accordingly.*

Solicitors: *Theodore Goddard & Co*, for A H M Smyth, Winchester; *Beer, Timothy Jones & Webb*.

G.F.L.B.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, LYELL AND COOKE, JJ)

30th June 1971

#### BRITISH ROAD SERVICES LTD AND ANOTHER v WURZAL

*Road Traffic—Goods vehicle—Plating and test certificates—Exemption—Vehicle 'temporarily in Great Britain'—Trailer owned by United Kingdom company—Use only for carrying goods between England and the Continent—Presence in England intermittent, but regular and repeated—Road Safety Act, 1967, s 14 (1), (2)—Goods Vehicles (Plating and Testing) Regulations, 1968, reg 3 (2), Sched 2, class 27.*

A tractor unit belonging to the first appellants, BRS, was towing a trailer unit belonging to the second appellants, SS Co. The first appellants were carriers of goods and provided tractor units as a matter of ordinary business to haul trailers owned by the second appellants, who were a United Kingdom company operating entirely as carriers of goods between England and the Continent and never requiring trailers to be hauled from a place in England to a destination in England. The tractor and trailer were stopped on a routine check under the Road Safety Act, 1967, and at the time had neither a plating certificate nor a goods vehicle test certificate, both of which, it was common ground, the trailer required under the Act unless it fell within the exemption provided by reg 3 (2) and Sched 2, class 27, to the Goods Vehicle (Plating and Testing) Regulations, 1968, as a vehicle "temporarily" in Great Britain. The first appellants were convicted of using the trailer on a road without a plating certificate in force at the time, contrary to s 14 (1) of the Act of 1967, and of using it on a road without a goods vehicle test certificate in force

at the time, contrary to s 14 (2) of the Act. The second appellants were charged with and convicted of permitting the use of the trailer in similar circumstances. On appeal,

**HELD:** as the presence of the vehicle in England, though intermittent, was regular and repeated, the vehicle could not be said to be "temporarily in Great Britain" within the meaning of the regulation at any relevant time; accordingly, the decision of the justices was right and the convictions must be affirmed.

**CASE STATED** by justices of the county of the West Riding of York acting in and for the petty sessional division of Saddleworth.

On 26th August 1970 informations were preferred by the respondent, Ernest Wurzal, against the first appellants, British Road Services Ltd ('BRS') in that they (a) on 26th February 1970 at Delph in the West Riding of the county of York did use on a certain road called A62 a goods trailer number 11765/17 being a goods vehicle of a class required by the Goods Vehicles (Plating and Testing) Regulations 1968 to have been submitted for examination for plating, there being no plating certificate in force for the vehicle at that time, contrary to s 14 (1) of the Road Safety Act 1967; (b) on the same day at the same place did use the same trailer being a goods vehicle of a class required by the Goods Vehicles (Plating and Testing) Regulations 1968 to have been submitted for a goods vehicle test, there being no goods vehicle test certificate in force for the vehicle at the time, contrary to s 14 (2) of the Road Safety Act 1967. On 26th August 1970 two further informations were preferred by the respondent against the second appellants, Seabourne Shipping Co Ltd ('Seabourne') in that they did permit the user of a goods trailer without there being in force a plating certificate or a test certificate on the date and at the place aforesaid, contrary to s 14 (1) and (2) of the Road Safety Act 1967 respectively.

The justices heard the informations together at Uppermill Magistrates' Court on 16th December 1970, with the consent of both appellants and found the following facts. BRS, who were carriers of goods, provided tractor units to haul trailers owned by Seabourne. Seabourne operated entirely as carriers of goods between England and the Continent and never required trailers to be hauled from one place in England to a destination there. On 26th February 1970 a trailer number 11765/17 owned by Seabourne but hauled by a unit owned by BRS was checked by a vehicle examiner employed by the Ministry of Transport at 4.00 pm on the A62. The articulated unit and trailer was driven by an employee of BRS. There was no plate displayed on the trailer and it had not in fact been plated or tested. The trailer was manufactured on 16th February 1966. On 26th February 1970 the trailer which had been loaded at Manchester docks had as its destination Rouen, France. The particulars of the inward and outward journeys of the trailer in 1970 were as follows:

*In UK*

2nd Feb 1970 Glasgow  
19th Feb 1970 Manchester  
11th March 1970 London

*Out of UK*

16th Dec 1969 Paris  
10th Feb 1970 Paris  
27th Feb 1970 Rouen  
19th March 1970 Sweden

It was contended for the respondent that, as the trailer was manufactured and licensed in Great Britain and owned and operated by a British company, it was not a trailer 'temporarily in Great Britain' for the purposes of the Goods Vehicle (Plating and Testing) Regulations 1968, reg 3 (2) and Sch 2, para 27, and therefore ought to have been plated and tested.

It was contended for the appellants that the trailer was exempt from the requirements of the Goods Vehicles (Plating and Testing) Regulations 1968 as it was 'temporarily in Great Britain' within the meaning of Sch 2, para 27, of those regulations; accordingly,

the respondent had made out no case of contravention of the Goods Vehicles (Plating and Testing) Regulations 1968 and s 14 (1) and (2) of the Road Safety Act 1967.

The justices were of the opinion that the ordinary meaning of temporarily was for a limited time. They heard nothing to the effect that the time during which the trailer had been or would be in Great Britain was limited and it followed that it ought to have been plated and tested. They accordingly convicted BRS of using the trailer and Seabourne of permitting its use without a plating or test certificate and ordered both appellants to pay fines of £5 on each information together with costs of £5.

*Richard Yorke QC for the appellants.*

*Gordon Slynn for the respondent.*

**LORD WIDGERY CJ:** This is an appeal by Case Stated by the justices of the county of the West Riding of York and for the petty sessional division at Saddleworth, who, on 16th December 1970, convicted the appellants of certain offences contrary to s 14 (1) of the Road Safety Act 1967.

To understand the nature of the charges I ought to say that on the day on which the alleged offences were committed, i.e. 26th February 1970, a tractor unit belonging to the first appellants, British Road Services Ltd, was towing a trailer unit belonging to the second appellants, Seabourne Shipping Co Ltd. The tractor and its trailer were stopped on a routine check under the Road Safety Act 1967, and it was discovered that the trailer had no plating certificate of the kind normally required for such a vehicle under s 14 (1) of the Road Safety Act, nor had it a goods vehicle test certificate required under s 14 (2). Accordingly, the first appellants were charged and convicted of using the trailer on the road at the relevant time, and the second appellants were charged with permitting the use of the trailer in similar circumstances.

The point at issue is a very short one and I can come to it quickly. It is unnecessary to explore the meaning and significance of the plating certificate and the goods vehicle test certificate. It suffices, as I say, that it is common ground between the parties that this trailer required those certificates under the Road Safety Act 1967 unless the relevant regulations made under that Act excluded it in the particular circumstances of the case. The relevant regulations are the Goods Vehicles (Plating and Testing) Regulations 1968, reg 3 of which provides:

'(1) Subject to paragraph (2) of this regulation, these regulations apply to goods vehicles of any of the following classes . . . (g) other trailers manufactured before the 1st January 1968 and the weight of which unladen exceeds 1 ton.'

By agreed amendment to the Case this trailer exceeded one ton unladen weight and was, therefore, *prima facie* required to comply with the regulations. But in reg 3 (2), it is provided: 'Nothing in these regulations shall apply to a goods vehicle of any of the classes of vehicle specified in schedule 2.'

One goes to Sch 2 for the list of exemptions and in class 27 of Sch 2 one finds exempted the following:

'Trailers temporarily in Great Britain a period of twelve months not having elapsed since the vehicle in question was last brought into Great Britain.'

The whole contention in this case is whether this particular trailer at the time when the alleged offence occurred was temporarily in Great Britain.

I go back to the Case, therefore, to see the surrounding facts as found by the justices. They find that British Road Services Ltd, the first appellants, are carriers of goods, and, as I have said, provide tractor units as a matter of ordinary business

to haul trailers owned by the second appellants. The second appellants operate entirely as carriers of goods between England and the Continent and never require trailers to be hauled from one place in England to a destination in England. Their work and the journeys of their trailers are, therefore, from England to the Continent and in reverse, but never from a point of departure in England to a destination in England. On the occasion giving rise to these charges the trailer was being hauled by a British Road Services tractor and on inspection it was found that no plating certificate or test certificate had been issued in respect of it.

The trailer was manufactured on 16th February 1966. The only relevance of that is to show that under the graduated system by which the new legislation was introduced, it was a trailer of such age that the requirements of the regulations would apply to it so far as that matter was concerned. The trailer had been loaded at Manchester docks. It was on its way to Rouen across the Channel from a port not disclosed, and the justices found that it had been similarly employed in the immediately preceding months, having gone to Paris in December, back to Glasgow in February, back to Paris again in February, back to Manchester again in February, to Rouen in February and indeed was on its way to Rouen in February when the inspection occurred which gave rise to these questions.

The justices took the view that the ordinary meaning of 'temporarily' was for a limited time. They said:

'We heard nothing to the effect that the time during which the trailer had been or would be in Great Britain was limited and it followed that it ought to have been plated and tested.'

It is on that basis that they convicted both the appellants of these offences.

Counsel for the appellants in this case has referred us to the dictionary definition of 'temporarily' which for this purpose can be expressed as 'lasting for a limited time'. He boldly grasps the nettle, so far as it is a nettle, by submitting that the antithesis of 'temporary' in this context is 'permanent' and that accordingly a vehicle which is not permanently in Great Britain must inevitably be temporarily there. Asked what is the criterion for determining whether the vehicle's presence is temporary or permanent, he says that it lies in the intention of the owner of the trailer or vehicle. The answer, therefore, on his submission to the question 'Permanent or temporary?' is 'What is the intention of the owner? Does he intend that the vehicle shall remain in this country for ever?'

Counsel for the appellants deals with one or two anticipated arguments of the respondent and one or two arguments indeed which the court has seen fit to put to him in the course of his submissions. He says that the base or ownership of the trailer is quite irrelevant and immaterial in deciding whether or not it is exempted under class 27. He says that the draftsman has shown that where he wishes to make the base or centre of the vehicle relevant he has said so. There are many examples in transport legislation of importance being attached to a base or centre from which a vehicle operates, and in class 26 of these regulations reference is made to vehicles having a base or centre in certain of the northern off-shore islands. So, argues counsel, if the draftsman had thought that the base or the centre from which the vehicle operates had anything to do with this matter, he would have said so in class 27. Further he points to some closely allied regulations, the Motor Vehicles (Construction and Use) Regulations 1969, which, dealing with a somewhat similar question, use this phrase in reg 4 (6):

'Part II of these regulations, except . . . [and then certain regulations are numbered] shall not apply to any motor vehicle or trailer brought temporarily into Great Britain by a person resident abroad . . .'

Accordingly, he contends that if the locality of the owners' residence has any materiality, it again would have been mentioned in class 27. It is evident, he submits, from these other regulations and the reference there to the residence of the owner of the vehicle, that this is a matter which, if relevant, is one which the draftsman would deal with expressly.

Counsel for the respondent submits that permanent is not the true or only antithesis to temporary in this context. He submits that when speaking of a vehicle being temporarily in Great Britain one is not concerned only with the period of time for which it is expected to be there. He says that in considering whether its visit, if I may so describe it, is a temporary one, one must also consider whether such visits are paid ordinarily or regularly by the same vehicle. It is the respondent's case that in order that the trailer may be described as being temporarily in Great Britain, one has to have regard to whether its presence was ordinary or unusual as well, the conception being that a visit constantly repeated and forming part of the regular life, as one might describe it, of the vehicle is not to be regarded as temporary merely because any individual visit is of relatively short duration.

For my part, I feel strongly that counsel for the respondent's approach is the right one. I cannot believe that in the context of these regulations the Minister intended that a vehicle should be excused from the very necessary safety precautions with which we are dealing unless it was here permanently for all time. I also think that there is implicit in the phrase 'temporarily in Great Britain' an element other than simply a time element, and I find that the language and the testing of this conception is most aptly expressed in a Scottish case on a wholly different subject but dealing with the same problem which we face today. This is *Inland Revenue v Cadwalader* (1). The facts there were that an American citizen, with his ordinary residence, and indeed practising the law, in New York, took a three-years lease of a furnished shooting lodge in Scotland. He resided at the shooting lodge for a period of two months in each year during the shooting season, but the lodge was available to him for the rest of the year if he had wished to come. He kept his home in New York open throughout the year and returned there when he was not shooting in Scotland. The question having arisen whether he was in Scotland for a temporary purpose only on those facts, LORD M'LAREN said:

'I do not think that Mr Cadwalader is in a position to affirm, when he comes year after year during the currency of his lease to spend the shooting season in Scotland, that he is here for a temporary purpose only. I do not mean that you might not frame a definition which would bring this within the scope of temporary purposes, but taking the ordinary meaning of the word I should say that temporary purposes means casual purposes as distinguished from the case of a person who is here in the pursuance of his regular habits of life.'

If you apply those words to the trailer in question, it is not here casually but regularly. It is here as part of its regular habits of life so far as a trailer can have such habits, and I am indebted to LORD M'LAREN for that extract from his judgment because it exactly expresses what I think must really be the guiding factor in construing the words with which we are concerned. If you have here, as you have, a trailer regularly travelling between England and the Continent so that its presence in England is intermittent but regular and repeated, I do not think that it can, on a fair use of language and in particular on a true construction of this regulation, be said to be a trailer temporarily in Great Britain at any relevant time. I would, accordingly, dismiss the appeal.



**LYELL J:** I agree with the judgment which has just been delivered by LORD WIDGERY CJ. I confess that I have found great difficulty in determining what is the proper construction of the word 'temporary' as it is here used, but the views on this word expressed by LORD M'LAREN appeal to me as being entirely in accord with the good sense of these regulations and I, like LORD WIDGERY, am content to accept them gratefully.

**COOKE J:** I agree.

*Appeal dismissed.*

Solicitors: Lovell, White & King, for Simpson, Curtis & Co, Leeds; Treasury Solicitor.

T.R.F.B.

#### COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES, LJ, LAWTON AND FORBES, JJ)

22nd July 1971

R v NOBLE

*Criminal Law—Appeal—Abandonment—Application to withdraw notice of abandonment—Circumstances in which granted.*

Although it is an established principle that the Criminal Division of the Court of Appeal will grant an application to withdraw a notice of abandonment of an appeal only in very unusual circumstances, the circumstances are not exclusively limited to cases where it is apparent on the face of the application that grounds exist for supposing that fraud or bad advice given by a legal adviser has resulted in an unintended, ill-considered application to abandon the appeal.

Where, therefore, notification of the single judge having granted leave to appeal had been dispatched to the applicant, but, owing to the postal strike, it did not reach him till after he had signed a notice of abandonment,

**HELD:** because of these special factors, particularly, the complete misapprehension of his position by the applicant, his application for leave to withdraw the notice of abandonment should be granted.

**APPLICATION** by Cyril Patrick Duncan Noble for leave to withdraw a notice of abandonment of his appeal against sentence.

*Patrick Pakenham* for the applicant.

*Ann Curnow* for the Crown.

**EDMUND DAVIES LJ** delivered this judgment of the court: We think that as these applications are rarely granted it might be wise if, in the course of a few observations, we make it clear why we are granting the application, which is for the reinstatement of an abandoned appeal. This court has said repeatedly—in *R v Moore* (1) and in *R v Sutton* (2)—that quite extraordinary circumstances must be shown to exist before that course will be allowed by the court.

What happened here is that on 1st March 1971 the applicant abandoned the appeal against sentence which he had put in on 4th December 1970. On 22nd February the

(1) [1957] 2 All ER 703.

(2) 133 JP 298; [1969] 1 All ER 928.

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<b>GAMING</b> – Betting – Office – Advertisement – ‘Premises giving access to a licensed betting office’ – Display of sign on outside wall – Sign showing company’s registered name and containing words ‘turf accountants’ – Indication that premises were licensed betting office – Betting (Licensed Offices) Regulations, 1960, reg 2 – Betting, Gaming and Lotteries Act, 1963, s 10 (5) (a), (b). <b>Maurice Binks (Turf Accountants) Ltd v Huss</b> .. .. .	<b>QBD</b>	<b>148</b>
<b>GAMING</b> – Forecast of future event – Photograph of players taken during football match – Ball not in photograph – Competitors required to mark most likely position of ball – Position later chosen by panel of judges – Success of competitors marking positions closest to that chosen by panel – Betting, Gaming and Lotteries Act, 1963, s 47 (a) (i). <b>Ladbroke (Football) Ltd v Perrett</b> .. .. .	<b>QBD</b>	<b>181</b>
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<b>GAMING</b> – Registration – ‘Club’ – Refusal to register or renew registration – Members’ clubs only included – Registration not applicable to proprietary clubs – Gaming Act, 1968, Sch 7, para 8. <b>Tehrani v Rostrom</b> .. .. .	<b>QBD</b>	<b>350</b>

single judge had granted leave to appeal and assigned legal aid. On 26th February notification of that decision was despatched, but it did not reach the applicant until 8th March, probably owing to the postal strike, and meanwhile he had abandoned his appeal. As soon as he received that notification of his application having been granted by the single judge, he promptly took steps to withdraw the abandonment of his application.

In *R v Sutton* certain observations were made by WINN LJ to the effect that this court will not entertain requests for leave to withdraw notices of abandonment unless it is apparent on the face of such a request and application that some grounds exist for supposing that there may have been either fraud, or at any rate bad advice given by some legal adviser, which has resulted in an unintended, ill-considered decision to abandon the appeal. This court does not regard those observations of WINN LJ as having comprehensively defined and limited the grounds on which this court can in proper circumstances allow an abandonment to be withdrawn. They are to be interpreted as stressing rather than quite unusual circumstances must be shown to exist. So, applying them, we regard this as a case where, for the reasons I have stated, it would not be just to allow the applicant to be defeated by the fact that he sought to withdraw his application under a complete misapprehension as to the position. It is because of those special factors that in this particular case we accede to the application.

*Application granted.*

Solicitors: *Offenbach & Co; Director of Public Prosecutions.*

T.R.F.B.

### COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW, LJ, GEOFFREY LANE AND KILNER BROWN, JJ)

20th June, 5th July 1971

R v NISBET

*Criminal Law—Indictment—Summary offence—Offence triable on indictment only by election of defendant—Election of defendant for trial by jury—Power to alter committal charge and add further counts—New counts in respect of offences triable on indictment only by election of defendant—Charges founded on evidence disclosed in depositions—Administration of Justice (Miscellaneous Provisions) Act, 1933, s 2 (2), proviso (i)—Magistrates' Courts Act, 1952, s 25 (1).*

Where a defendant under s 25 (1) of the Magistrates' Courts Act, 1952, elects to be tried by jury on a charge in respect of which he could not have been committed for trial by jury without his election, it is lawful for the charge on which he has been committed for trial to be altered in the indictment or for other counts to be added, whether or not in respect of alleged offences for which he could not have been tried on indictment in the absence of his own election and whether or not those counts are laid under a different Act and involve higher penalties. This, however, is subject to the limitations (i) that, apart from the requirements of s 2 (2) (b) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, the new counts, are under proviso (i) to s 2 (2), 'founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment' and (ii) that the alteration or addition of the counts so altered or added is not unfair or oppressive to the defendant.

*R v Brown* (1895), 59 JP 485, followed.

*R v Phillips* 117 JP 235; [1953] 1 All ER 968; [1953] 2 QB 14, not followed.



APPEAL by Robert McPheat Nisbet against his conviction of making, for the purpose of obtaining the grant of a certain licence for himself, a false statement by omitting to disclose a previous conviction at Peterborough Quarter Sessions on 17th January 1969.

M B McMullan for the appellant.

C C Colston for the Crown.

*Cur adv vult*

5th July. **MEGAW LJ** read this judgment of the court. Section 235 (1) of the Road Traffic Act 1960, as amended, provides:

'A person shall be guilty of an offence who knowingly makes a false statement for the purpose—(a) of obtaining the grant of a [driving licence].'

The offence under s 235 (3) is punishable on summary conviction by a fine or by imprisonment for a term not exceeding four months. Because of the maximum term of imprisonment the accused person, under s 25 of the Magistrates Courts Act 1952, may claim to be tried by a jury. If he does so elect, the justices, if satisfied on the evidence before them that there is a case which should properly be tried, commit the accused for trial, and the accused is tried before a jury on an indictment. There is no provision in s 235 such as is found, for example, in s 233 of the Act of 1960 or in s 110 as amended, whereby the prosecution has the option of proceeding in respect of an offence either by summary proceedings or on indictment.

The appellant was charged before the Peterborough justices with one offence under s 235. The charge, no doubt prepared by a police officer, and not by a lawyer, was in these words:

'On the 25th September, 1970, at Peterborough, for the purpose of obtaining the grant of a certain licence to himself, did knowingly make a false statement, namely, did omit to disclose a previous conviction imposed at Peterborough Quarter Sessions on the 17th of January 1969.'

If a charge in those words had been included in an indictment, it would certainly have been subject, at least, to obvious and justified criticism. The appellant elected to be tried by a jury. Evidence was taken. The justices committed the appellant for trial on the charge as laid. In due course the appellant appeared before Huntingdon and Peterborough Quarter Sessions on an indictment which contained four counts. Counts 1 to 3 charged him with making false statements for the purpose of obtaining a driving licence. Each of these counts related to the same occasion on 25th September 1970. The particulars of count 1 alleged a false statement that the appellant was not then disqualified from obtaining the said licence. This count, it may be thought, was intended to reflect, though in substantially different words, the particular matter intended to be comprised in the particulars of the charge as laid before the justices. The particulars of count 2 alleged a false statement that the appellant had never lived at Burghley Road. The particulars of count 3 alleged a false statement that a case history relating to one Robert McPheat Nisbet produced to him by Dorothy Green (an official of the driving licence department who had interviewed the appellant when he applied for the driving licence) did not apply to him, the appellant. That case history included a record, *inter alia*, of convictions of the appellant relevant to his application. Count 4 alleged forgery of a driving licence, under s 233 of the Act, by reference to an alteration in a driving licence produced by the appellant. It is not contended on the appellant's behalf that any of these four counts was not founded on facts or evidence disclosed in depositions taken before the justices in the appellant's presence. Nor has it been suggested that such facts and evidence were improperly included in the depositions.

At quarter sessions the appellant was represented by counsel (not counsel who represented him in this court on the appeal) and solicitors. No comment of any kind was made by the defence with regard to the indictment until after the jury had returned their verdicts. At no stage of the trial was any application made that the indictment, or any count in it, should be quashed. The jury acquitted the appellant on counts 1 and 4, but by a majority of ten to two found him guilty on counts 2 and 3. Let it be said that, on the evidence before the jury, those verdicts are perfectly sensible and intelligible. No criticism of the summing-up has been made or could legitimately be made.

The deputy chairman originally sentenced the appellant to 12 months' imprisonment on each of the two counts, the sentences to run concurrently and to be suspended for three years. It was then pointed out to him by counsel for the prosecution that the maximum sentence which could be imposed was four months on each count. The deputy chairman thereupon altered the sentences to four months' imprisonment on each count, suspended for three years. It is clear from the transcript and from the certificate endorsed on the indictment that these two sentences were ordered to be concurrent. At that stage, between the realisation of the error in the sentence and its correction, counsel who then represented the appellant had a sudden thought. He said:

'I think the law is that where somebody elects trial the prosecution are not entitled to add to the indictment any further counts because he has elected trial only on that particular count . . .'

There was, however—it may be quite rightly—no application for the quashing of the indictment or any count in it nor any motion in arrest of judgment.

The appellant appeals by leave of the single judge against conviction and sentence. So far as sentence is concerned, it should be said straight away that the application and appeal are based on a misunderstanding. It was thought by those representing the appellant that the two terms of four months imprisonment were ordered to run consecutively. In fact, as has been said, they were concurrent. No other point arises as regards sentence, should the conviction stand.

So far as concerns conviction, the very clear and interesting argument addressed to us by counsel who represented the appellant in this court involves two submissions, in some degree interrelated. The Administration of Justice (Miscellaneous Provisions) Act 1933, to which we shall refer as 'the 1933 Act', was enacted on the occasion of the abolition of grand juries from the English system of criminal procedure. Section 2 (2) made provision that

'no bill of indictment charging any person with an indictable offence shall be preferred unless either—(a) the person charged has been committed for trial for the offence; or (b) the bill is preferred [by a direction or order in certain cases].'

There is then a proviso, the first part of which reads:

'(1) where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment . . .'

Counsel for the appellant contends, as his first and principal submission, that, where the offence on which the accused person has been committed for trial is an offence

which can be tried on indictment only if the accused person so elects, no other offence within the same category may be charged in another count in the same indictment unless the accused person has been charged before the justices with, and has elected trial before a jury in respect of, that other alleged offence. Counsel for the appellant bases that proposition on the submission that it only becomes an 'indictable offence' if the accused person makes his election; and that if it is not an indictable offence it cannot lawfully be joined in an indictment.

Counsel for the appellant's second, and related, point, is that, even if the joinder of such a further count is not illegal by statutory provision, it has been held that to permit it would be to allow an accused person to be unfairly trapped, by exercising his election without realisation of, or warning of, the possible consequences; and that therefore the court will not permit it to be done.

For both these submissions, counsel for the appellant relies primarily on *R v Phillips* (1) in which the judgment of the Court of Criminal Appeal was delivered by LORD GODDARD CJ. In that case the accused had elected trial in respect of an offence under the Vehicles (Excise) Act 1949 relating to a false declaration that a motor vehicle had not previously been registered. That was a summary offence in the sense that it could not be tried by indictment before a jury except on the election of the accused person. When the accused person had so elected, he was tried on an indictment which charged him with offences under a wholly different Act, the Perjury Act 1911, which also carried much more severe penalties. The accused person was not legally represented at his trial. On appeal against conviction, the convictions under the Perjury Act were quashed. The court, having referred to s 2 (2), proviso (i), of the 1933 Act, said:

'nevertheless this court cannot approve of such a course being taken because in reality it is turning the option that is given to a defendant by section 17 of the Summary Jurisdiction Act, 1879, into something in the nature of a trap. A person finds himself before the justices charged with an offence for which the maximum punishment is six months' imprisonment, elects to go for trial before a jury, and then finds that he is charged with a different offence, carrying heavier penalties, and one with which, had he been convicted before the justices, he could not subsequently have been charged. In this case, had the appellant not opted to go for trial, but been convicted by the justices, he could not afterwards have been prosecuted under section 5 of the Perjury Act. This court cannot approve of the addition or substitution of another charge to or for the charge for which a prisoner was originally before the justices in any case where quarter sessions only obtain jurisdiction by reason of the prisoner having exercised his option under section 17. I think that that ought to be understood.'

Section 17 of the Summary Jurisdiction Act 1879 there referred to was the statutory provision then in force corresponding to what is now s 25 of the Magistrates Courts Act 1952.

We shall have to return to the question of 'a trap', which forms the basis of counsel for the appellant's second submission. For the time being we are concerned with the implication, which may be read into the words there used, that in no circumstances is it permissible, despite the terms of the proviso to s 2 (2) of the 1933 Act, for any other charge of any sort to be added or substituted when the accused person is indicted by reason of his election to be tried by a jury. Counsel for the appellant naturally and properly, relies strongly on that implication. In a later decision, a decision of this court, *R v Roe*, *R v Roe* (2), the court refused to accept the correctness of

(1) 117 JP 235; [1953] 1 All ER 968; [1953] 2 QB 14.

(2) 131 JP 169; [1967] 1 All ER 492.

that implication at least in its full width. In *R v Roe* the offence with which the accused persons had originally been charged before the justices was what is sometimes called 'a hybrid offence': that is, the prosecution could have proceeded in the first instance by indictment, though in fact it chose to proceed by summary trial. The accused persons then exercised their right of election. The indictment contained not only the original charge of ill-treating a child, under the Children and Young Persons Act 1933, but also other counts alleging much more serious offences, such as, under s 18 of the Offences Against the Person Act 1861, causing grievous bodily harm with intent. When the matter came for trial, the defence moved to quash the indictment. The trial judge, JOHN STEPHENSON J, refused to quash the indictment. He took the view that *R v Phillips* (1) was wrong, being in conflict with *R v Brown* (2), a decision of the Court of Crown Cases Reserved. The defendants were convicted on various counts. They appealed, by certificate of the trial judge. This court in a judgment delivered by LORD PARKER CJ said that *R v Phillips* appeared to be in conflict with *R v Brown* and observed that *R v Brown* had not been referred to in *R v Phillips*. However, the court did not find it necessary fully or finally to resolve that issue. The court distinguished *R v Phillips* on the ground that there the offence originally charged could not have been made the subject-matter of an indictment except on the accused person's election, whereas in *R v Roe* as also in *R v Gibbs* (3) the original charge was of a 'hybrid offence'. The objection of 'the trap' which was apparently the foundation of the decision in *R v Phillips*, was not regarded as being applicable in respect of a hybrid offence. This, at least, follows from the decision in *R v Roe*—that it is not necessarily and inevitably wrong for counts to be added to an indictment—even counts involving a wholly different Act and much higher penalties—merely because the occasion for the indictment has been a committal resulting solely from the election of the accused person.

The question remains, however, whether the lawfulness of adding such counts is limited to those cases in which the original charge, although in fact launched in the form of summary proceedings, could itself, had the prosecution been so minded, have been made the subject of trial by jury in the first instance. That involves consideration of *R v Brown* (3), the decision of the Court of Crown Cases Reserved already mentioned, which was not cited in *R v Phillips* (1). Counsel for the appellant submits that, when one considers the relevant procedural position and legislation then prevailing, *R v Brown* is seen to be a case where the offence originally charged was an 'indictable offence, in the sense that it would have been open to the prosecution to have proceeded by indictment in the first instance. He says that the references in the headnote to 'an indictable offence' are correct and have that meaning. He submits that the statement in the judgment of LORD PARKER CJ on *R v Roe* (4) is wrong in classifying the offence originally charged in *R v Brown* as being 'a summary offence only'. Having considered the relevant legislation then in force, we have come to the conclusion that counsel for the appellant is wrong in that submission; that the submission of counsel for the Crown to the contrary is right; and that LORD PARKER CJ was not in error. 'Indictable offence' in the headnote in *R v Brown* means no more than an offence which, solely at the election of the accused person, could be tried on indictment under s 17 of the Summary Jurisdiction Act 1879, which, as we have said, corresponds to s 25 of the Magistrates Courts Act 1952 in force today. In *R v Brown* the charge on which the magistrates had committed, as a result of the accused person's election, was substantially amended in the indictment, and other charges were added. The

(1) 117 JP 235; [1953] 1 All ER 968; [1953] 2 QB 14.

(2) 59 JP 485; [1895] 1 QB 119.

(3) 129 JP 42; [1964] 3 All ER 776; [1965] 2 QB 281.

(4) 131 JP 169; [1967] 1 All ER 492.

objection taken was that the indictment was bad because it contained other and different charges from that on which the defendant was brought before the magistrates. The rejection of that contention was upheld by the Court of Crown Cases Reserved.

If and insofar as *R v Brown* (1) is in conflict with *R v Phillips* (2), we prefer to follow the former decision. In our judgment, it is not unlawful, where an accused person elects to have a trial by jury on a charge in respect of which he could not have been committed for trial by jury without his election for the charge on which he has been committed to be altered in the indictment, or for other counts to be added, whether or not in respect of alleged offences for which he could not otherwise have been tried on indictment in the absence of his own election. That was held to be lawful in *R v Brown* and there has been no relevant change in the legislation affecting its lawfulness at the present day.

Of course, there are limitations. Some of those limitations are contained in the Indictments Act 1915. An important limitation is that which is prescribed in the proviso to s 2 (2) of the 1933 Act. A count cannot lawfully be added unless it is 'founded on facts or evidence disclosed in any examination or deposition taken before a justice'. There is, in our judgment, a further protection. The court—whether the trial court on objection then taken to the indictment or this court on appeal—has inherent jurisdiction to ensure that the alteration of the original charge when it becomes a count in the indictment, or the addition of further counts, even if they are founded on evidence in the depositions, is not unfair. It must have been on the basis of that inherent jurisdiction that the Court of Criminal Appeal acted in *R v Phillips* (2). For in that case, as in the present case, no application had been made at the trial for the indictment, or any count in it, to be quashed. Proviso (b) to s 2 (3) of the 1933 Act expressly provides that an

'indictment or count shall not be quashed under this subsection in any proceedings on appeal, unless application was made at the trial that it should be so quashed.'

That subsection was not referred to by the court in *R v Phillips*. Presumably the court regarded itself, we think rightly, as having inherent jurisdiction to prevent injustice by quashing the convictions (or, as it might have done, quashing counts in the indictment) in respect of counts substituted or added in the indictment, even though they were founded on evidence in the depositions.

We thus come to counsel for the appellant's second submission. He contends that what was said in *R v Phillips* necessarily involves that an addition of counts, as in the present case, always constitutes 'a trap', is unfair to the accused person, and should not be permitted, and, if such addition is made, any resulting conviction should not be allowed to stand. We agree that the words used in *R v Phillips* appear to indicate that that was the view of the court in that case. If it was, we respectfully disagree with it. Moreover, in *R v Roe* (3) the court clearly did not regard it as a 'trap' or as unfair or as leading to an obligation to quash convictions although, as there had happened, much more serious counts under a different statute had been added to the original charge of a hybrid offence on which the accused persons had made their election. True, in that case, the added counts could presumably, although very inconveniently, have been made the subject-matter of a separate indictment. But the addition of them, in the indictment, did produce the result that the accused persons were deprived, by their election in respect of the original charges, of committal proceedings in respect of the added counts.

(1) 59 JP 485; [1895] 1 QB 119.

(2) 117 JP 235; [1953] 1 All ER 968; [1953] 2 QB 14.

(3) 131 JP 169; [1967] 1 All ER 492.



In the present case, without the appellant's election on the original charge he could not have been tried on the other charges as separate charges otherwise than by summary proceedings, unless, on the occasion arising, he were so to elect in respect of those other charges. However, it may well be supposed that, just as he elected trial by jury on the charge as framed, he would equally have elected in respect of the other charges if and when they had been framed against him. Moreover, he has not in fact been subjected to a more severe sentence (the concurrent suspended sentences of four months' imprisonment) than would have been the appropriate sentence if he had been dealt with by the justices on the two charges on which he was convicted by the jury.

In our judgment the jurisdiction which was applied in *R v Phillips* (1) is a jurisdiction which indeed exists and which is not precluded by s 2 (3) of the 1933 Act. But in so far as that case laid down that there may never be a substitution or an addition of other charges in cases such as the present, we think that the principle was too widely stated. It is a jurisdiction which may and should be exercised to prevent the unfair or oppressive addition or substitution of charges. But in the present case there is no ground for holding that there was any unfairness in the addition of the counts on which the appellant was convicted. Accordingly, the appeal against conviction is dismissed. The appeal against sentence, is also dismissed.

*Appeals dismissed.*

Solicitors: Registrar of Criminal Appeals; David Beal, Peterborough.

T.R.F.B.

(1) 117 JP 235; [1953] 1 All ER 968; [1953] 2 QB 14.

### COURT OF APPEAL (CRIMINAL DIVISION)

(FENTON ATKINSON, LJ, ROSKILL AND CAULFIELD, JJ)

16th July 1971

R v KNULLER (PUBLISHING, PRINTING AND PROMOTIONS) LTD AND OTHERS

*Criminal Law—Conspiracy to corrupt public morals—Agreement to insert in magazine advertisements encouraging readers to meet advertisers for purpose of homosexual conduct.*

Although buggery and gross indecency in private between consenting male adults over 21 is by virtue of the Sexual Offences Act, 1967, no longer a crime an agreement between two or more persons to insert in a magazine advertisements for the purpose of inducing or encouraging such homosexual conduct may constitute the offence of conspiracy to corrupt public morals. It is a question of fact for the jury to decide whether in a particular case such advertisements, judged by present-day standards, do corrupt public morals.

*Criminal Law—Conspiracy to outrage public decency—Offence not limited to reference to acts to be performed in public.*

The offence of conspiracy to outrage public decency is not limited exclusively to reference to acts to be performed in public.

APPEALS by Knuller (Publishing, Printing and Promotions) Ltd ('the company'), Graham Keen, Peter Stansill and David Hall, against their convictions at the Central Criminal Court of conspiracy to corrupt public morals and conspiracy to outrage public decency when the company was ordered to pay fines of £1,000 and £500 and



up to £500 towards the costs of the prosecution, the appellants, Keen, Stansill and Hall each being sentenced to concurrent terms of 18 months' imprisonment and 12 months suspended for two years and ordered to pay up to £200 towards the costs of the prosecution.

*J B R Hazan QC and L Brittan for the appellants.*

*R D L Du Cann and J W O Curtis for the Crown.*

**FENTON ATKINSON LJ** delivered this judgment of the court. On 10th November 1970 at the Central Criminal Court before Judge Sutcliffe and a jury the appellants were convicted, after a lengthy trial, on two counts, the first of conspiracy to corrupt public morals, that was count 1, and conspiracy to outrage public decency, that was count 2.

From 1st January 1969 to 30th May 1969, that is, the period covered by the two counts in the indictment, the three individual appellants were directors of the company which published fortnightly a magazine known as 'IT', or to give it its full and correct title, the International Times. The appellant Stansill, aged 27, was the editor and he was a writer who joined the staff of this publication in 1966. The appellant Hall, a man of 33, was a former shop steward at Dagenham; he was the business manager who joined the company in 1968. The appellant Keen, a man of 32, was a freelance journalist, a member of the National Union of Journalists, who joined the company in 1968.

The defence claimed that the International Times was designed to give publicity to the views of those holding minority, and perhaps anti-establishment, views, for example, anarchists or black power, squatters, those 'busted', as they put it, for drug offences, and even schoolboys who were compelled by their headmasters to cut their hair, and all who felt themselves victimised and oppressed, including homosexuals. It was asserted that the three appellants were all men of the highest ideals acting throughout from the highest motives. The circulation of the paper was said at one time to be about 38,000 copies, though of the last edition 54,000 copies were printed. The appellant Stansill thought that the readers could include up to as many as 10,000 schoolboys and 20,000 to 30,000 students. There was in fact one witness for the prosecution, a schoolboy, who got a substantial stock to resell to his fellow pupils at a school in the Isle of Wight.

The prosecution, as one understands it, did not really mince their words, but they claimed that any profession of high ideals was a lot of rubbish, and one does not have to look very far through the exhibits in this case for ample material to support that view. After issue 54 had been published the police stepped in on 28th April 1969. They raided the premises and took possession of a number of documents. Issue 56, published a little later, carried a colourful description of the arrival of the 'fuzz', as the police were termed, and particular complaint was made of the seizure of small advertisements and answers to them, because it was stressed that whatever certain other gay magazines might do 'we run these ads as a service to bring people together who are lonely or who have difficulty meeting one another'.

The two counts were framed in this way. Count 1 alleged conspiracy to corrupt public morals, the particulars being that

'between the 1st of January and the 30th May 1969, you conspired together and with persons inserting advertisements in issues of a magazine entitled "IT", under the heading "Males", and with other persons unknown, by means of that magazine and those advertisements to induce readers thereof to meet those persons inserting such advertisements for the purpose of sexual practices taking place between male persons and to encourage readers to indulge in such

practices, with intent thereby to debauch and corrupt the morals as well of youth as of divers other liege subjects of Our Lady the Queen.'

Count 2 charged conspiracy to outrage public decency, the particulars being that:

'you conspired together and with persons inserting lewd, disgusting and offensive advertisements in issues of a magazine entitled "IT", under the heading "Males", and with other persons unknown, by means of the publication of that magazine containing those advertisements, to outrage public decency.'

Those are the two counts on which the jury eventually convicted. The indictment, as will be seen, referred specifically to the column of advertisements headed 'Males' in each number. That particular advertisement column was headed with this caption:

'INFORMATION. It is illegal for minors to place ads in this classification, or for advertisers to seek to contact minors (under 21).'

The prosecution, as we understand it, submitted that that was, if one may use the phrase, a bit of eyewash, because all three appellants accept that advertisements would be used by older men to get hold of boys and youths, no doubt from the schools and colleges where this paper circulated so freely, and counsel for the appellants certainly accepted that count 1 would have been appropriate if advertisements were sent in by or addressed to young men under 21 and had been published or accepted.

One only has to look at a selection from the hundreds of such advertisements, in our view, to see how idle it was to suggest that only those over 21 were being aimed at or catered for, and to see how untrue it was to say that this was merely a service to bring lonely people together. For example, this is the type of thing which one can read fortnight after fortnight:

'Alert young designer, 30, seeks warm, friendly, pretty boy under 23 who needs regular sex, reliability and beautiful surroundings. If the cap fits and you need a friend, write.'

That was February 1969. Then: 'Goodlooking boy 23, desperately wants pretty younger boyfriend. All photos, letters answered'. The appellant Stansill giving evidence said that he thought it must mean over 21 and the appellant Keen thought under 23 but over 21. It was difficult to see why that should not attract answers from anyone under 21.

There was another advertisement:

'Young gay [and "gay" in this context means homosexual] male desperately needs to earn £40 as soon as possible. Will do anything legal. Genuine replies only please.'

That was apparently some young man offering to prostitute himself for £40. Then: 'Young dolly boy seeks sugar daddy. Photo appreciated.'

'Male (32) seeks younger male for genuine friend (versatile passive) please. Looks immaterial, but must be virile, quiet disposition. I have own house, would suit working boy, of boyish nature, for weekends or share house together.'

Then there was: 'Inexperienced student seeks initiation by beautiful young man.'

'Young gay driver wanted, masculine and muscled, for young business man. Top wage plus expenses. Easy hours. Plenty of travel.'

That seems to be money being offered to a young gay driver quite regardless of age, and so it went on. 'Attractive male seeks bed initiation dolly boy or other uninitiated.' The appellant Stansill gave evidence that this was an experimenter over 21 seeking another experimenter, and it was not corrupting unless it set them on a path that they would not otherwise have taken. When asked by the judge how far down that path one has to go to be corrupted, in his view, people are only corrupted if they are victimised, harassed and suicidal. One gets 'Gay active bodybuilder required for a very lucrative weekend', another example, apparently, of a financial inducement being held out in return for homosexual services.

It was said that the appellants censored these advertisements. There was a lady employed called Miss Ninon and she acted as the censor. It was said that without hesitation she rejected all those with any immoral implications. One wonders, perhaps, what if anything she was prepared to class as immoral. But the written instructions—an exhibit which was taken possession of by the police when they raided these premises—show quite clearly that the appellants realised that they were sailing pretty close to the law, and they gave instructions to the staff as to how they were to approach these advertisements, particularly under age, e.g. for 'gay young mod 16 years, etc.' They were enjoined—they did not put it precisely in the language that counsel for the appellants would have used if he had been advising them in conference, but their language was plain and leaves no doubt what was intended: 'If a court can prove we contributed to any fuckups he later gets involved with then we're in the shit'; that was how they put it. Then they went on to deal with flag and perv and other deviant sexual activities: 'These can be draggy'—by which we understand bringing one into trouble with the law—if the ad can ever be used in evidence against us.' Then they go on to say how it is all right advertising 'lists, books, etc. for dirty pix, but if we advertise the pix themselves we must be sure they do not contravene the Post Office Act or the Obscene Publications Act'. So they were clearly alive to the dangers of what they were doing. It is said at one stage indeed they sought the legal advice of a solicitor—not, be it at once stated, the solicitors who are at present acting for them. One certainly wonders what solicitor could have advised them to go on publishing advertisements of this kind.

It is perhaps relevant to look at the adjoining pages of this paper to see the sort of context in which these male ads were being published. One sees in the 'Males' column that there is an institution called

'Males Anonymous. Current nationwide membership of 700 lonely males seeking compatible partners with whom they can pursue various stimulating activities.'

People were invited to join their society regardless, apparently, of age. Then one sees a lot of advertisements headed 'Love' where men and women of varying ages and tastes in sexual matters were seeking members of the opposite sex. One gets a young man seeking tuition from an experienced woman (girl); one gets two brothers in their mid-30's offering a cozy nest to a lazy chick who wants to be spoiled and pampered. One gets a lesbian lady advertising for a companion in that particular form of activity, and one gets a lady wanting a wealthy man to look after her. On the other side there are various illustrated advertisements and photographs of nude ladies which can be yours for only 10s, and then there are pictures of 'gay young men, with style and pose and lack of clothes', 16 superb photos of gay young men; that costs 25s, and there is a lot of that sort of advertisement, advertisements to men how to increase their vital dimensions and how to acquire 'an extensive range of items designed to increase the intensity of sexual pleasure. Many of these have never before been available in this country'. That is the general tone of this part of the paper with which we are concerned.

It appears to us that this is exactly the situation which was contemplated in the Ladies Directory case, *Shaw v Director of Public Prosecutions* (1), by VISCOUNT SIMONDS and by LORD TUCKER. LORD SIMONDS said:

'Let it be supposed that, at some future, perhaps early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if, even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that, if the common law is powerless in such an event, then we should no longer do her reverence.'

LORD TUCKER said:

'Suppose Parliament tomorrow enacts that homosexual practices between adult consenting males is no longer to be criminal, is it to be said that a conspiracy to further and encourage such practices amongst adult males could not be the subject of a criminal charge fit to be left to a jury?'

Those two judgments were expressly concurred in by LORD MORRIS OF BORTH-Y-GEST and by LORD HODSON, and we regard that plainly as an authority binding on this court that there is such a thing as an offence of conspiracy to corrupt public morals by encouraging conduct which is not illegal.

The arguments in the court below, and indeed the argument here from counsel for the appellants on count 1, has proceeded on these lines, that even if the law is correctly stated in those passages I have read from the speeches of LORD SIMONDS and LORD TUCKER, there was really nothing here advocating or encouraging buggery or gross indecency. That was more pressed at the trial than it was in this court. Counsel for the appellants did not really pursue that point, certainly not with any vigour. The judge ruled at the trial, and we agree with him, that that was a matter for the jury to decide with ample evidence before them.

Then it was said, and this was counsel for the appellants' main argument, that, as the Sexual Offences Act 1967 has said that buggery and gross indecency in private between consenting male adults is no longer a crime, that in some way alters the whole position. We are unable to accept that submission. Recourse to prostitutes was not illegal at the date of *Shaw v Director of Public Prosecutions* (1), even if those services included what the appellants refer to as 'flag and perv', and the fact that Parliament has now said that acts of this kind between adults in private shall not be a crime does not carry with it, in our view, the consequence that such conduct may not be calculated to corrupt public morals.

But even on the basis that the appellants agreed to publish only advertisements inserted by and directed to those over 21 (a difficult basis to accept on the evidence), it was for the jury to say whether by present day standards, which they were there to represent, these advertisements were in their view corrupting of public morals even though Parliament had provided that acts of this kind between consulting male adults should no longer be a crime. In our view on count 1 there was a proper direction and the jury returned the only possible answer.

Count 2 has caused us more difficulty. Apparently the prosecution in preferring these two charges had different sections of the population in mind. In count 1 they had in mind those who were liable to be corrupted by advertisements of this kind. In count 2, on the other hand, they had in mind those members of the public who might read this paper, and who, while in no danger of being corrupted, would be simply disgusted and shocked to think that such stuff should be published. There is no doubt that there is a common law offence of the nature they were charged

(1) 125 JP 437; [1961] 2 All ER 446; [1962] AC 220.

with conspiring to commit, but counsel for the appellants says that the essence of the offence is that some act shall be done in public so as to be seen by two or more persons. He says that a newspaper of this kind is in truth only a private communication between the publishers of the paper and some one particular individual who buys it. It is further complained by counsel for the appellants that framing the count in this way was a way of, in effect, bypassing the Obscene Publications Act 1959 and was therefore embarrassing to the appellants, but the prosecution did not allege that the advertisements were obscene within that Act, and the answer to this is to be found in the passage in LORD SIMOND's speech in *Shaw v Director of Public Prosecutions*. He complains of the direction of the judge and says that it did not give any adequate or specific direction on the need for publicity and for an act to be done in public.

We have considered that. It may be that the direction is not wholly satisfactory, but on the other hand evidence was given by the appellants of their wide distribution and circulation among various classes of society. In our view, the offence the conspiracy to commit which was charged here cannot be limited to an actual act which has to be performed in public, and with a paper of this kind, having a wide circulation and being read at any one time by numerous people in different places; there is no difference in principle between that and, let us say, a 'blue film' which is seen by only two or three people at one particular time. We think that the conviction on both these counts should stand, and it follows that the appeals must be dismissed. The applications for leave to appeal against sentence are refused.

*Appeals and applications dismissed.*

*Solicitors: Registrar of Criminal Appeals; Director of Public Prosecutions.*

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, O'CONNOR AND LAWSON, JJ)

19th, 20th, 29th July 1971

BEXLEY CONGREGATIONAL CHURCH TREASURER v LONDON BOROUGH  
BEXLEY

*Rating—Rateable occupation—Unoccupied premises—Charity—House provided by church body as residence for minister of religion—House vacated by minister on retirement—House held available as minister's residence during period before appointment of successor—Liability of church body for rates during interim period—General Rate Act, 1967, s 40 (1) (a), (9), Sch 1, para 2 (f).*

A church body provided a house as the minister's residence. The minister, who had been in occupation, retired on July 30, 1969, and vacated the house, which remained empty until 2nd July, 1970, when his successor took up residence there. During the intervening period the church body held the premises available as a minister's residence, and under s 40 (1) (a) of the General Rate Act, 1967, was rated to half the general rate as the occupier of the house. The church body claimed that no rates were payable on the ground that during the intervening period the house was not occupied and, by virtue of para 2 (f) of Sch 1 to the Act, it was exempt from liability to the unoccupied rate. The rating authority contended that, under s 40 (9), the house, though actually vacant, was to be treated as occupied by the church body. Justices accepted the argument of the rating authority and ordered that a distress warrant should issue. On appeal,



**HELD:** it was a legitimate inference from the finding of the justices that the house during the intervening period was being "held available" within s 40 (9) on behalf of the charity so that it could be offered to a successor to the retiring minister as his official residence, which would be a use of the house for the purposes of the charity; actual residence was not essential to constitute occupation where there had been an actual occupation followed by a period of non-occupation, and there was an intention to re-occupy at some future date for a charitable purpose; the occupation for use by a charity for charitable purposes was, accordingly, continued during the intervening period, and the decision of the justices was right.

**PER CURIAM:** Section 40 (9) of the General Rate Act, 1967, creates a "deemed" occupation and use of a minister's official residence held available "for the purposes of this section". The inclusion of para 2 (f) in Sch 1 to the Act makes it clear beyond doubt that the "deeming" is also effective to exclude the hereditament from rating liability under Sch 1.

**CASE STATED** by justices of Bexley in the South-Eastern London Commission Area.

On 19th November 1970, at Dartford Magistrates' Court, two complaints were preferred by the London Borough of Bexley for the issue of a distress warrant under the General Rate Act 1967 against the appellant, the Bexley Congregational Church, on the ground that, it being rated and assessed to general rate in respect of 259 Upton Road, Bexley, had not paid the sums due on 1st April 1970 and 1st October 1969. These complaints were heard on 19th November 1970 when the magistrates granted to the rating authority a distress warrant for a sum of £47 0s 8d, being £46 8s 2d rates with 12s 6d costs.

*A J Anderson* for the appellant.

*G W Seward* for the respondent.

*Cur adv vult*

29th July. **LAWSON J** read this judgment of the court: This appeal by way of Case Stated against the decision of Bexley justices on 19th November 1970 to grant a distress warrant to the respondent, the London Borough of Bexley, against the Bexley Congregational Church, the appellant, raises an important question as to the liability for rates of a hereditament, a dwelling-house at 259 Upton Road, Bexley, owned by the Bexley Congregational Church and held by it as an official residence for the minister of that church. The case is concerned with a period between 30th July 1969 and 2nd July 1970, during which the house was in fact vacant, but was held available by the church as a minister's residence from which a minister would perform the duties of his office.

The facts which were proved or admitted before the justices were as follows. The premises 259 Upton Road, Bexley, were rateably occupied by the appellant from 22nd September 1966, from which date the premises were used as a residence by the minister. The minister vacated the premises on 30th July 1969, and the premises remained empty until 2nd July 1970, on which date the newly appointed minister took up residence. During this period the appellant held the premises available as a minister's residence. Thirdly, the premises are within the provisions of s 40 (9) of the General Rate Act 1967, and an allowance of 50 per cent of the domestic general rate has been made since 22nd September 1966 in accordance with the provisions of s 40 of that Act. Fourthly, the respondent by resolution dated 19th July 1967, applied s 17 of and Sch 1 to the General Rate Act 1967 to the London Borough of Bexley in respect of the rating of certain unoccupied properties as defined therein. Finally, the appellant had claimed that no rates were payable during the period from 31st July 1969 to 2nd July 1970 and the respondent had refused to admit the claim on the grounds that the premises were rateably occupied by the appellant during this period by reason of the provisions of the said s 40 (9) of the 1967 Act.



It is necessary to say a little concerning the history of charities under the rating law. After earlier uncertainty it was established as a result of the decision of the House of Lords in *Mersey Docks & Harbour Board v Cameron* (1) that hereditaments, other than places of public religious worship, belonging to charitable (including ecclesiastical) organisations and held or used for their charitable purposes did not possess any immunity in law from liability to rates unless under or in accordance with the provisions of statute. A number of local Acts made such provision as did some public and general Acts, such as the Scientific Societies Act 1843, the Sunday and Ragged Schools (Exemption from Rating) Act 1869 and the Voluntary Schools Act 1897.

From 1865 onwards some rating authorities did as a matter of practice accord a measure of relief to charities not possessing statutory rights of immunity. This was done by a variety of administrative measures, some of doubtful validity (for example, by omitting hereditaments from the rating list) and, after 1925, by the exercise of a statutory power to remit or reduce rates, but there was no discernible pattern, still less uniformity, in these practices. Section 8 of the Rating and Valuation (Miscellaneous Provisions) Act 1955 provided, for the first time, statutory relief from rates as a general principle applicable to all charities, and, speaking generally, confirmed the various reliefs which had been given extra-statutorily by rating authorities since about 1865. This was, however, designed as a temporary measure. In 1958 a committee was appointed to review the present treatment for rating of hereditaments occupied for purposes of a charitable nature. This committee was known as the Committee on the Rating of Charities and Kindred Bodies, and had Sir Fred Pritchard as its chairman. It presented its report in 1959. This is a valuable source of information as to the earlier history of the subject. Following this report Parliament enacted s 11 of the Rating and Valuation Act 1961 which gave effect to a majority of the committee's recommendations. Section 11 was, in due course, replaced by s 40 of the General Rates Act 1967—a consolidating Act. The present case is primarily concerned with the interpretation and effect of that section as far as the official residences of ministers of religion are concerned. It should be mentioned, however, that the report of the committee to which we have referred contained no discussion or recommendations on that specific topic.

The relief now generally available under s 40 of the 1967 Act is of two types of benefits in the case of hereditaments occupied by a charity and used wholly or mainly for charitable purposes. So far as relevant to the present case, the first benefit is that the rate of liability of such a hereditament shall not exceed one-half of the norm for the area (s 40 (1)); the second benefit, with which this case is not specifically concerned, is that the rating authority may reduce or remit the payment of rates chargeable in respect of that hereditament for certain specified periods or indefinitely (s 40 (5) and (6)). This power to reduce or remit rates in the case of hereditaments within the section is in addition to the general powers of rating authorities to the same effect on the ground of property (s 53 of the 1967 Act). To qualify for the half-rate benefit it is necessary that the rating authority is given notice that the relevant hereditament falls within s 40 (1) and it is a condition of entitlement to that benefit that the hereditament must both be occupied by the charity and also be used wholly or partly for charitable purposes. The special case of charity-owned residences of ministers of religion from which they perform the duties of their office is brought within the condition of entitlement (s 40 (1)) by s 40 (9) of the Act. That subsection applies whether such a residence is actually occupied by a minister at any relevant time or is merely held available awaiting the appointment of a new minister and his taking up the accommodation held available for him. In the latter case the holding of the residence available has a double effect: first it is treated as occupied by a

(1) (1865), 29 JP 483; 11 HL Cas 443; [1861-73] All ER Rep 78.

charity although it is in fact vacant and out of residential use; and secondly it is treated as wholly or mainly used for charitable purposes so far as the right to rate relief under s 40 is concerned.

It is now necessary to turn to the other statutory provisions, namely, s 17 of and Sch 1 to the General Rate Act 1967 which are relevant to the case. The Local Government Act 1966 for the first time conferred on rating authorities the power to rate unoccupied properties. These powers are now found in the parts of the 1967 Act just referred to. If, as has happened in the case of the London Borough of Bexley, it is resolved that unoccupied properties in the rating authority's area shall be rated and the appropriate statutory procedures are operated to make such resolution effective, then Sch 1 to the Act governs the position. The principle briefly is that after a hereditament has been unoccupied for three months, it may be rated and, if so, it will be rated at one-half the norm for the area during the period of non-occupation. Paragraph 2 of Sch 1 excludes certain types of unoccupied hereditaments from being rated under its provisions. These fall into two broad classes: first (para 2 (a)-(d) inclusive) certain types of hereditaments the occupation of which is prohibited or restricted by or under certain laws; secondly two types of hereditaments which are subject to a rate liability in law notwithstanding that they are actually vacant, that is to say, cases where the owner has agreed to pay rates to the authority in respect of the hereditament whether or not it is vacant (s 56 (1) (a)) and cases where s 40 (9) of the Act is in operation. To this particular point we shall later return.

It is convenient to epitomise the contrasting effects of s 40 of the 1967 Act on the one hand and of Sch 1 to that Act on the other. It may be said that the former aims at providing a measure of relief to certain hereditaments, which would otherwise be under a full rating liability, while the latter aims at imposing a measure of liability for rates in respect of hereditaments, other than the excepted classes listed in para 2 (a)-(d) of Sch 1, which would otherwise, because of non-occupation, be free of such liability. The question for consideration here, however, cannot be answered by making a simple choice between these alternatives.

To find the correct answer to the question in this case, one must determine what the position of the hereditament here concerned would have been under the rating law had the legislation of 1955 and 1961 not been enacted. Assuming for the moment that a minister had been living there as his official residence during the period 30th July 1969 to 2nd July 1970 it is clear on authority (a) that his occupation would have been the occupation in law of the charity for whom his services were being provided: this is clear from *Reed v Cattermole* (1), which although concerned with tax liability, is equally valid as to liability for rates (see LORD REID in *Glasgow City Corpn v Johnstone* (2)), and (b) that his occupation would have constituted a use by the charity for charitable purposes (see *Glasgow City Corpn v Johnstone*, and *Northern Ireland Comr of Valuation v Fermanagh Protestant Board of Education* (3)). Thus, assuming a minister's actual residence, it is clear that the hereditament would, prior to 1955, have been rateable.

During the relevant period here, 30th July 1969 to 2nd July 1970, however, the minister's residence was in fact vacant but was being held available to provide a residence from which a new full-time minister, when appointed, should perform the duties of his office. It is a legitimate inference from the justices' finding here that the hereditament was 'held available', that the charity was concerned from 30th July 1969 to find a successor to the minister who had then vacated. Thus holding the hereditament available so that it could be, and doubtless was, offered to a successor

(1) [1937] 1 All ER 541; [1937] 1 KB 613.

(2) 129 JP 250; [1965] 1 All ER 730; [1965] AC 609.

(3) 133 JP 637; [1969] 3 All ER 352.

as his official residence would constitute the use of the premises for the purposes of the charity. Further, on the authorities, actual residence is not essential to constitute occupation where, as here, there has been an actual occupation followed by a void period and an intention to reoccupy at some future date and for a particular purpose has continued throughout (see *Gage v Wren* (1) and *R v Melladew* (2)). Thus during the 'held available' period the premises in this case would under the old law have been treated as occupied for rating purposes.

This conclusion enables the rating liability of the particular hereditament in this case to be determined. That liability in our judgment is properly found by treating it as one which but for s 40 of the 1967 Act would have been fully chargeable for rates during the 'held . . . available' period because in law it was both occupied and was used for the charity. The alternative view that it could be rated under Sch 1 must be rejected as the provisions of the Schedule apply only (subject to the exceptions) to hereditaments which but for Sch 1 would not be subject to rate liability.

It remains to consider the precise effect of para 2 (f) of Sch 1 to the 1967 Act which deals with the special case of ministers' official residences 'held . . . available', under the general provisions that certain hereditaments (of which this type is one) shall not be rated under the schedule for any period during which the conditions applicable to the various classes listed are satisfied and for a further three months after those conditions cease to be satisfied. As has been said these classes fall into two broad groups. We are not concerned with the first of these (Sch 1, para 2 (a)-(d)). Of the second group, the first, para (e) is the clear case of an agreement by an owner to pay rates whether or not a hereditament is occupied; this is clearly taken out of para 1 of Sch 1 because it is in any event fully liable for rates. The second, para (f), refers to the case of the minister's official residence 'held . . . available' which again is liable for rates fully, under the old rating law, and with relief entitlement, under the present law, which s 40 (1) taken with s 40 (9) of the 1967 Act provides.

On this basis it might be contended that the inclusion of para 2 (f) in Sch 1 to the Act was unnecessary. We consider, however, that its presence can be explained by observing that s 40 (9) creates a 'deemed' occupation and use of a minister's official residence held available 'for the purposes of this section'. The inclusion of the subparagraph in the schedule makes it clear beyond doubt that this 'deeming' is also effective to exclude the hereditament from rating liability under Sch 1.

In the result the justices reached the correct decision in this case and in granting the distress warrant, and this appeal is, therefore, dismissed.

*Appeal dismissed.*

Solicitors: *Kingsford, Dorman & Co; C G Dennis, Erith.*

T.R.F.B.

(1) 67 JP 32; [1900-03] All ER Rep 247.

(2) 71 JP 125; [1907] 1 KB 192; [1904-07] All ER Rep 339.

<b>HIGHWAY</b> - Gipsy - Encamping without lawful authority or excuse - Meaning of 'encamp' - Highways Act, 1959, s 127 (c). <b>Smith v Wood</b> .. .. .	<b>QBD</b>	<b>257</b>
<b>HIGHWAY</b> - Obstruction - Stall for sale of goods - Implied licence by local authority. <b>London Borough of Redbridge v Jaques</b> .. .. .	<b>QBD</b>	<b>98</b>
<b>HOUSING</b> - Compulsory purchase - Clearance area - Adjoining land - Need to show purchase necessary for satisfactory development or use of cleared area - "Cleared area" - Housing Act, 1957, s 43 (2). <b>Coleen Properties Ltd v Minister of Housing and Local Government</b> .. .. .	<b>CA</b>	<b>226</b>
<b>HOUSING</b> - Multiple occupation of premises - Requirements to execute works - Notice - Wilful failure to comply - Defence - Bona fide belief that works better performed later - Housing Act, 1961, s 15 (1) (3) - Housing Act, 1964, s 64 (1). <b>Honig v London Borough of Islington</b> .. .. .	<b>QBD</b>	<b>233</b>
<b>HUSBAND AND WIFE</b> - Maintenance of wife - High Court order registered in magistrates' court - Application for variation - Substantial expenditure of time - Remission to High Court - Maintenance Orders Act, 1958, s 4 (4). <b>Gsell v Gsell</b> .. .. .	<b>PDA</b>	<b>163</b>
<b>HUSBAND AND WIFE</b> - Matrimonial home and other properties bought in husband's name with wife's money - Sums transferred by wife to husband at his request - Imposition of trust on husband. <b>Heseltine v Heseltine</b> .. .. .	<b>CA</b>	<b>214</b>
<b>HUSBAND AND WIFE</b> - Matrimonial home - Separation order obtained by wife - Husband tenant of home - Power of court to exclude husband for limited time - Matrimonial Homes Act, 1967, s 1 (2). <b>Tarr v Tarr</b> .. .. .	<b>CA</b>	<b>222</b>
<b>HUSBAND AND WIFE</b> - Summary proceedings - Evidence - Unsworn statement of a party. <b>Aggas v Aggas</b> .. .. .	<b>PDA</b>	<b>484</b>
<b>HUSBAND AND WIFE</b> - Summary proceedings - Procedure - Justices' right to stop case at close of complainant's evidence - Application to matrimonial cases - Right of complainant's advocate to address justices. <b>Mayes v Mayes</b> .. .. .	<b>PDA</b>	<b>487</b>
<b>INFANT</b> - Custody - Order of magistrates - Appeal - Further evidence - Discretion of appellate court. <b>Re B (T A) (an infant)</b> .. .. .	<b>Ch D</b>	<b>7</b>
<b>LOCAL AUTHORITY</b> - Statutory powers - Enforcement - Assurance to company of land with access to and use of authority's property - Decision by authority to develop property as housing estate - Right to override company's rights. <b>Dowty Boulton Paul Ltd v Wolverhampton Corporation</b> .. .. .	<b>Ch D</b>	<b>333</b>
<b>LOCAL GOVERNMENT</b> - London - Transfer of land - Land held for two purposes - Vesting in borough council. <b>Greater London Council v London Borough of Croydon</b> .. .. .	<b>Ch. 2</b>	<b>466</b>
<b>LOCAL GOVERNMENT</b> - Merger of council with other councils to form county borough - Loss of employment of clerk and solicitor - Re-settlement and long term compensation - Local Government (Compensation) Regulations, 1963, regs 8, 14 (1) (c) (f). <b>Myrddin-Baker v Teesside County Borough Council</b> .. .. .	<b>QBD</b>	<b>152</b>
<b>MAGISTRATES</b> - Committal to quarter sessions for sentence - Application to change plea of guilty. <b>R v Mutford and Lothingland Justices. Ex parte Harber. R v East Suffolk Quarter Sessions. Ex parte Harber</b> .. .. .	<b>QBD</b>	<b>107</b>
<b>MAGISTRATES</b> - Domestic proceedings - Questions to witness - Interest of party - No positive case made by other party - Magistrates' Courts Act, 1952, s 61. <b>Brewster v Brewster</b> .. .. .	<b>PDA</b>	<b>501</b>
<b>MAGISTRATES</b> - Irish warrant - Endorsement - No inquiry whether prima facie case made out - Habeas corpus - Likelihood of prosecution or detention for political offence - Backing of Warrants (Republic of Ireland) Act, 1965, s 1 (2) (b). <b>R v Brixton Prison Governor. Ex parte Keane</b> .. .. .	<b>QBD</b>	<b>38</b>
<b>MAGISTRATES</b> - Natural justice - Magistrate acting in administrative or executive capacity - Duty to act openly, impartially and fairly - Seizure of sweet potatoes by local authority officer - Meeting between justice and local government officials before hearing - Box of sweet potatoes shown and sample cut open - Retirement at end of hearing of magistrate with public analyst and chief veterinary officer - Advice received, but not communicated to defendants - Food and Drugs Act, 1955, s 9 (3) - Colouring Matter in Food Regulations, 1966, reg 5 (1). <b>R v Birmingham City Justices. Ex parte Chris Foreign Foods (Wholesalers) Ltd</b> .. .. .	<b>QBD</b>	<b>73</b>
<b>POLICE</b> - Retirement - Compulsory retirement - Medical examination - Quasi-judicial function - Conformity with rules of natural justice. <b>Re Godden</b> .. .. .	<b>CA</b>	<b>543</b>

<b>PUBLIC ORDER</b> - Public place - Using threatening behaviour - Railway station platform - Public Order Act, 1936, ss 5, 9. <i>Cooper v Shield</i> .. .. .	<b>QBD</b>	<b>434</b>
<b>QUARTER SESSIONS</b> - Appeal - Plea - Change of plea - Enquiry whether plea of guilty at magistrate's court equivocal - Right to remit case to magistrate - Quarter sessions entitled to consider only what happened before magistrate - Nothing in proceedings before magistrate casting doubt on plea. <i>R v Marylebone Magistrate. Ex parte Westminster City Council. R v Inner London Quarter Sessions. Ex parte Westminster City Council</i> .. .. .	<b>QBD</b>	<b>239</b>
<b>QUARTER SESSIONS</b> - Committal for sentence - Gravity of offence apparent from nature of charge - Nothing emerging from facts stated by prosecution to increase gravity of offence - Magistrates' Courts Act, 1952, s 29. <i>R v Tower Bridge Magistrate. Ex parte Osman</i> .. .. .	<b>QBD</b>	<b>427</b>
<b>RACE RELATIONS</b> - Housing - Council houses - Tenants restricted to British subjects - Validity - Action for declarations by local authority - Competency - Race Relations Act, 1968, s 2 (1), s 19 (10). <i>London Borough of Ealing v Race Relations Board</i> .. .. .	<b>QBD</b>	<b>131</b>
<b>RATING</b> - Machinery and plant - Generation of power - Electric motors, hydraulic pumps, and air compressors - Motive power derived from electricity supplied to factory - Hydraulic and pneumatic power distributed throughout factory - Rating and Valuation Act, 1925, s 24 (1), Sched 3 (1) (a) - Plant and Machinery (Rating) Order, 1960, Sched. <i>Chesterfield Tube Co Ltd v Thomas (Valuation Officer)</i> .. .. .	<b>CA</b>	<b>1</b>
<b>RATING</b> - Rateable occupation - Unoccupied premises - Charity - House provided by church body as residence for minister of religion - House vacated by minister on retirement - House held available as minister's residence during period before appointment of successor - Liability of church body for rates during interim period - General Rate Act, 1967, s 40 (1) (a), (9), Sched. I, para 2 (f). <i>Bexley Congregational Church Treasurer v London Borough Bexley</i> .. .. .	<b>QBD</b>	<b>574</b>
<b>RENT CONTROL</b> - Contract referred to tribunal - Entry upon consideration of reference - Papers considered by each member of tribunal individually - Assembly and visit to view premises - No admission obtained - Letter of withdrawal - Not operative till received by tribunal - Rent Act, 1968, s 73 (1). <i>R v Tottenham District Rent Tribunal. Ex parte Fryer Bros (Properties) Ltd</i> .. .. .	<b>QBD</b>	<b>94</b>
<b>RIGHT OF WAY</b> - Land sold by Secretary for Air - Conveyance of land 'freed from rights' - Application to rights of way - Defence Act, 142, s 14. <i>Attorney-General v Shonleigh Nominees Ltd</i> .. .. .	<b>ChD</b>	<b>551</b>
<b>ROAD TRAFFIC</b> - Articulated vehicle with trailer - Use for unsuitable purpose - Unsuitability for load on route chosen - Motor Vehicles (Construction and Use) Regulations, 1969 (SI 1969, No 321), reg 76 (3). <i>British Road Services Ltd v Owen</i> .. .. .	<b>QBD</b>	<b>399</b>
<b>ROAD TRAFFIC</b> - Causing death by dangerous driving - 'Cause' of accident - No need to prove substantial or major cause - Road Traffic Act, 1960, s 1. <i>R v Hennigan</i> .. .. .	<b>CA</b>	<b>504</b>
<b>ROAD TRAFFIC</b> - Dangerous driving - Not absolute offence - Need to prove fault on part of driver - 'Fault' - Deliberate misconduct, recklessness or moral blame not necessarily involved - Failure to show care or skill of competent and experienced driver sufficient - Momentary lapse - Inference of fault from facts of situation - Right of driver to prove special facts avoiding inference - Road Traffic Act, 1960, s 2 (1). <i>R v Gosney</i> .. .. .	<b>CA</b>	<b>529</b>
<b>ROAD TRAFFIC</b> - Driving test - Duty of examiner appointed by Ministry. <i>British School of Motoring Ltd v Simms and Another, Stafford Third Party</i> .. .. .	<b>Assizes</b>	<b>103</b>
<b>ROAD TRAFFIC</b> - Driving while disqualified - Outstanding offences taken into consideration - Similar offence. <i>R v Jones</i> .. .. .	<b>CA</b>	<b>36</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Arrest without warrant - Powers of police to detain thereafter - Road Safety Act 1967, ss 1, 2 (2), 2 (4), 3 (1), 4. <i>R v Mackenzie</i> .. .. .	<b>Assizes</b>	<b>26</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Ascertainment of alcohol proportion - 'Ascertainment from laboratory test' - Drink consumed after cessation of driving - Adjustment of test - Road Safety Act, 1967, s 1 (1). <i>Rowlands v Hamilton</i> .. .. .	<b>HL</b>	<b>241</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion exceeding prescribed limit - Attempting to drive - Car stopped by person wrongly believed by defendant to be police officer - Ignition keys handed over - Departure of defendant from car - Return - Demand for handing back of keys - Refusal - Subsequent breath test - Road Safety Act, 1967, s 1 (1). <i>Harman v Wardrop</i> .. .. .	<b>QBD</b>	<b>255</b>



<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion exceeding prescribed limit - Provision of specimen - Blood - Analysis by ordinary equipment and skill - Gas chromatography. <b>Smith v Cole</b> .. .. .	<b>QBD</b>	<b>97</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion exceeding prescribed limit - Specimen for laboratory test - Failure to supply - Reasonable excuse - Excuse relating to blood specimen only - Liability to supply specimen of urine - Direction to jury - Road Safety Act, 1967, s 3 (3) (6). <b>R v Harling</b> .. .. .	<b>CA</b>	<b>29</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion exceeding prescribed limit - Specimen for laboratory test - Hospital patient - Notification to medical practitioner of proposal to make 'requirement' - Failure to include in notification statutory warning of possible consequences of refusal - Road Safety Act, 1967, s 3 (2), (3), (10). <b>R v Knightley</b> .. .. .	<b>QBD</b>	<b>453</b>
<b>ROAD TRAFFIC</b> - Goods vehicle - Plating and test certificates - Exemption - Vehicle 'temporarily in Great Britain' - Trailer owned by United Kingdom company - Use only for carrying goods between England and the Continent - Presence in England intermittent, but regular and repeated - Road Safety Act, 1967, s 14 (1), (2) - Goods Vehicles (Plating and Testing) Regulations, 1968, reg 3 (2), Sched 2, class 27. <b>British Road Services Ltd v Wurzel</b> .. .. .	<b>QBD</b>	<b>557</b>
<b>ROAD TRAFFIC</b> - Heavy goods vehicle - Driver's licence - Application to licensing authority - Insufficient driving experience of applicant - Refusal - Appeal to justices - 'Person aggrieved' - Power in justices to order authority to grant licence - Road Traffic Act, 1960, s 195 (2), Sched 15, para 1. <b>R v Ipswich Justices. Ex parte Robson</b> .. .. .	<b>QBD</b>	<b>462</b>
<b>ROAD TRAFFIC</b> - Light signals - Fire brigade vehicles - Passing red lights - Order regulating - Validity. <b>Buckoke v Greater London Council</b> .. .. .	<b>CA</b>	<b>321</b>
<b>STATUTE</b> - Construction - Purposive interpretation - Act providing minimum sentences for specified criminal offences. <b>Kennedy v Spratt</b> .. .. .	<b>HL</b>	<b>203</b>
<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Assessment - Application of Pointe Gourde principle to cases under Land Compensation Act, 1961, s 6 (1), Sched 1, part 1. <b>Wilson v Liverpool City Council</b> .. .. .	<b>CA</b>	<b>168</b>
<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Reference to Lands Tribunal - Agreement between parties as to basis of assessment - Subsequent decision of House of Lords that that basis wrong - Power of court to remit case to tribunal - Discretion. <b>Wilson v Liverpool City Council</b> .. .. .	<b>CA</b>	<b>168</b>
<b>TOWN AND COUNTRY PLANNING</b> - Development - Open land used for market trading - Building erected over whole of site - Ground floor area remaining open - Automatic extinction of former use - New planning unit with nil use created. <b>Petticoat Lane Rentals Ltd v Secretary of State for the Environment</b> .. .. .	<b>QBD</b>	<b>410</b>
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Service - "Occupier" - Licensee - Caravan dweller - Town and Country Planning Act, 1962, s 45 (3) (a). <b>Stevens v London Borough of Bromley</b> .. .. .	<b>ChD</b>	<b>380</b>
<b>TOWN AND COUNTRY PLANNING</b> - Permission - Refusal - Appeal to Minister - Decision in accordance with general policy - Need for genuine consideration of particular matter - Town and Country Planning Act, 1962, s 179 (1) (3) (b). <b>H Lavender and Son Ltd v Minister of Housing and Local Government</b> .. .. .	<b>QBD</b>	<b>186</b>
<b>TOWN AND COUNTRY PLANNING</b> - Permission - Refusal - Authority required to purchase land - Compensation - Assessment. <b>Margate Corporation v Devotwill Investments Ltd</b> .. .. .	<b>HL</b>	<b>19</b>
<b>TRADE DESCRIPTIONS</b> - Defence - Act or default of another person - 'Another person' - Company - Commission of offence through breach of duty of branch manager - Trade Descriptions Act, 1968, s 11 (2), s 24 (1). <b>Tesco Supermarkets Ltd v Natrass</b> .. .. .	<b>HL</b>	<b>289</b>
<b>TRADE DESCRIPTIONS</b> - Defence - 'Mistake' - 'Act or default' - Offence due to conduct of employee - Trade Descriptions Act, 1968, s 24 (1) (a). <b>Birkenhead and District Co-operative Society Ltd v Roberts</b> .. .. .	<b>QBD</b>	<b>194</b>
<b>TRADE DESCRIPTIONS</b> - False description - Milk - Foil cap on bottle accurately describing milk and bearing retailer's name - Names of milk suppliers to whom bottle belonged embossed on bottle - Trade Descriptions Act, 1968, s 1 (1) (b), s 3 (1). <b>Donnelly v Rowlands</b> .. .. .	<b>QBD</b>	<b>100</b>
<b>TRADE DESCRIPTIONS</b> - False description - Sale of second-hand car - False number of miles on indicator - Defence - Reliance by defendants on information supplied to them - Act or default of another person - Failure to take all reasonable precautions or exercise all due diligence - Trade Descriptions Act, 1968, s 24 (1) (a) (b), (3). <b>London Borough of Richmond v Motor Sales (Hounslow) Ltd</b> .. .. .	<b>QBD</b>	<b>236</b>
<b>VAGRANCY.</b> See Criminal Law.		





**COURT OF APPEAL (CIVIL DIVISION)**

(LORD DENNING, MR, SALMON AND MEGAW, LJJ)

24th, 25th May 1971

**R v TOTTENHAM DISTRICT RENT TRIBUNAL. Ex parte FRYER BROS (PROPERTIES) LTD**

*Rent Control—Furnished letting—Reference of contract to tribunal—Withdrawal of reference—Entry by tribunal on consideration of reference—Time of entry—When members of tribunal start to read papers and consider relevant facts—Need to meet for consideration—Rent Act, 1968, s 73 (1).*

By s 73 (1) of the Rent Act, 1968: "Where a [contract for a furnished letting] is referred to a rent tribunal and the reference is not, before the tribunal have entered upon consideration of it, withdrawn by the party or authority who made it, the tribunal shall consider it and then" shall approve or reduce the rent or dismiss the reference.

A tribunal enters on consideration of a reference within s 73 (1) when all three members of the tribunal have started to read the papers in it, and consider the relevant facts and documents

Per LORD DENNING MR: A tribunal does not enter on consideration of a reference when their clerk receives the tenant's application to the tribunal to hear it and goes through it to see whether the letting was within the jurisdiction of the tribunal, or, alternatively, when he sends out notices of the hearing: the tribunal cannot delegate to their clerk the consideration of an application, they themselves must enter on consideration of the reference.

Per SALMON, L.J.: It is not necessary that the members of the tribunal should meet together to consider the application or that there should be a hearing. They could consider the application by communicating with each other in writing or possibly by telephone.

*Rent Control—Furnished letting—Reference of contract to tribunal—Withdrawal of reference—Application—Service—Rent Act, 1968, s 73 (1).*

Per SALMON, L.J.: The notice of withdrawal to be effective does not have to be served personally on the members of the tribunal or their clerk. It is properly served within a reasonable time of its reaching the office of the tribunal during office hours—where there has been a reasonable opportunity for the office staff in the ordinary course to bring it to the notice of the clerk.

Per MEGAW, L.J.: A withdrawal is effective when it has been brought to the notice either of the members of the tribunal itself or to the notice of the representative of the tribunal duly authorised to receive such a notice, eg, the clerk, or when it should, with proper administrative efficiency and diligence have been brought to the attention either of the members of the tribunal or the duly authorised officer.

Decision of Divisional Court (p 94 ante) affirmed.

APPEAL by Fryer Bros (Properties) Ltd, from a decision of the Divisional Court, reported p 94 ante, refusing their application for an order of certiorari to remove into the High Court to be quashed a decision of Tottenham District Rent Tribunal.

*L A Marshall for the landlords.*

*Gordon Slynn for the tribunal.*

**LORD DENNING MR:** Fryer Bros (Properties) Ltd are the owners of 7 Princes Avenue, Muswell Hill, London, N10. On 13th September 1969 they let a flat in the house to a Mr Penn at a rent of £6 3s a week, furnished. On 8th October 1969 he referred the contract to the rent tribunal in accordance with the Rent Act 1968. He wanted the tribunal to fix the rent of the flat. According to his statement, it was a

tenancy of just one room, which was a bed-sittingroom, furnished with a bed, a chest of drawers and a few other things. He shared a bathroom and toilet with other people in the house.

On receipt of the application the clerk to the tribunal looked to see whether it was within their jurisdiction. He made sure that it was within their district and that it was within the rateable limit. Having satisfied himself that there was jurisdiction, the clerk wrote to the landlords asking them for information in accordance with s 72 (2) of the Rent Act 1968. The landlords did not give the information. On 13th November 1969 the clerk to the tribunal sent out notices both to the landlords and to the tenant, saying that the tribunal were going to hear the application on Monday, 24th November 1969, and would visit the premises during that morning.

Before the application was heard, however, the landlords sought to settle the matter by agreement. They approached the tenant and offered to reduce the rent from £6 3s to £5 a week. He was reluctant to accept, but thought that they would turn him out unless he agreed. They also told him to write a letter to the tribunal withdrawing his application. He did so. Its terms show his state of mind. It is dated Friday, 21st November 1969. This is what he said:

'Dear Sirs, I have today reached an agreement with the owner of this flat regarding rent and length of time I will be allowed to stay. I am sorry to cancel my application at this late date, but I had to compromise and accept their offer as I was assured I would be evicted if I let my application stand.'

It would appear that the tenant took that letter round by hand to the tribunal in the evening of Friday, 21st November 1969, but that the offices were then closed. So he put it through the letterbox. It was not opened until Monday morning, 24th November 1969, at about 9.00 am when the staff arrived. Meanwhile, however, the clerk to the tribunal had already, on the Friday afternoon, handed to the members of the tribunal the papers for Monday morning. They included the papers relating to Mr Penn's flat. Over the weekend each member of the tribunal read his papers; and each of them completed a record sheet. In it each wrote down the particulars of the premises which they were to visit on the Monday morning. Each finished reading the papers by the Sunday evening. At that time none of the members had any idea that the tenant had withdrawn his application. His letter was still in the letterbox. On the Monday morning at 9.30, Mr Penn telephoned to the clerk of the tribunal. He asked whether the withdrawal of his application had been accepted. The clerk told him that the letter had been received too late to be shown to the members of the tribunal and that they would be visiting the premises at 10.00 that morning.

The members of the tribunal did not go first to the offices of the tribunal. They went straight to the flat. They intended to inspect it before holding the hearing. They could not get in. The tenant was not there. They visited other premises and then went to the tribunal offices. The clerk then told them of the letter which had been received from the tenant, Mr Penn. The tribunal decided that the withdrawal was too late. They took the view that they had already 'entered upon consideration' of the reference, and that they would go on and consider it further. They adjourned it that day. But it was heard later—I think on 12th December 1969. The tribunal held that even the £5 was too high. They reduced the rent to £4 a week, for this one room. The landlords then moved the Divisional Court to quash the decision of the tribunal. They said that the tenant had withdrawn his application and that the tribunal had no right to go on with it. The Divisional Court rejected the application for certiorari. The landlords appeal to this court.

Section 73 (1) of the Rent Act 1968 provides:

'Where a Part VI contract [i.e., a contract for a furnished letting] is referred to a rent tribunal and the reference is not, before the tribunal have entered upon consideration of it, withdrawn by the party or authority who made it, the tribunal shall consider it and then, after making such inquiry as they think fit and giving to each party to the contract . . . an opportunity of being heard or, at his or their option, of submitting representations in writing, the tribunal . . .

'(a) shall approve the rent payable under the contract, or

'(b) shall reduce the rent to such sum as they may, in all the circumstances, think reasonable, or

'(c) may, if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision.'

It is plain from that section that the tenant can withdraw the reference 'before the tribunal have entered upon consideration of it'; but not afterwards. When does the tribunal 'enter upon consideration' of the reference? We are told that there is much confusion on the matter. Several cases have been before the Divisional Court and are noted in the *Estates Gazette*; but they throw little light on it.

Several dates have been canvassed before us. It was suggested that the tribunal could act by their clerk; and accordingly that, as soon as the clerk entered on consideration of the reference, the tribunal could be said to do so. Thus the clerk might 'enter upon consideration' of the reference as soon as he received the application and went through it to see if it was within the jurisdiction of the tribunal. Alternatively, the clerk might 'enter upon consideration' of the reference when he sent out the notices for the hearing. But I think that in this regard the tribunal cannot act by their clerk. It is the tribunal themselves, and not their clerk, who have to approve the rent, and to reduce it, or to dismiss the reference. It is their 'consideration' of those matters which is here spoken of. Schedule 10, para 1, to the Act says that a rent tribunal shall consist of a chairman and two other members. Those three are the tribunal which must 'enter upon consideration' of the reference. Not until those three begin to consider it can the tribunal be said to have 'entered upon consideration' of it.

Seeing that the tribunal of three are those concerned, counsel for the landlords has argued forcibly that the three of them, as a tribunal, do not 'enter upon consideration' of the reference until they meet together. He suggested at one stage that it was when they meet together to hear the submission of the parties, but he afterwards said it was when they meet together to inspect the premises. On either footing he would succeed in this case. The three here did not meet together until 10.00 on the Monday morning. The tenant's notice of withdrawal was received at any rate by 9.30 that morning. So it was received before they met together.

On the other hand, counsel for the tribunal submits that it is not necessary for the three members to meet together. The tribunal, he says, enters on the consideration of the reference as soon as all three of them have read the papers, or more accurately, when each one of them has started to read the papers in preparation for the hearing of the case. In the present case we know from the affidavit that, by the Sunday evening, each one of the three members had gone through the papers and had entered on the record-sheet the particulars of the properties which they were going to visit. At that stage at least they had entered on consideration of the reference.

The rival arguments are nicely balanced. If I were asked to say when this court 'enters upon consideration' of an appeal, I would say that we do not do so until we come into court and the case is called on for hearing. It may be that some members of the court will have read the papers beforehand. Some may have read the notice of appeal and the judgment in the court below. But, in so doing, they would not be 'entering on the consideration of the appeal'. They would only be preparing

to enter on the consideration of it. But, I think a rent tribunal is a very different body. They can and do act quite informally. They may come to a decision, if the parties so wish, merely on submissions in writing. In such a case, they may come to a decision on the papers without meeting at all, as, for instance, by agreeing in correspondence or by telephone. Seeing that it is such an informal tribunal, I think it proper to say that they 'enter upon consideration of the reference' when all three members of the tribunal have started to read the papers in it. In order to withdraw the application, the party must 'withdraw' before that time. It is not sufficient for him to put a notice of withdrawal in the letterbox after office hours. A withdrawal is not complete until it is communicated to the clerk of the tribunal or his staff, which may be taken to be the time when it is received during office hours.

In this case, on the affidavit of Colonel Buckley, the chairman of the tribunal, all three members had read the papers and so 'entered upon consideration' of the reference at least by that Sunday evening, 23rd November 1969. The notice of withdrawal was not communicated to the clerk to the tribunal until Monday morning when the letters were opened, followed up by the telephone message at 9.30 am. But it was too late then. The tribunal had already entered on consideration of the reference. In those circumstances the tribunal then were entitled to continue with the reference and to reduce the rent, as they did. That is a decision in rem which fixes the rent of this one-room flat.

I think, therefore, that the Divisional Court were right, and I would dismiss this appeal.

**SALMON LJ:** I agree. I am quite satisfied that the notice of withdrawal was not served when it was put into the letterbox by the tenant on Friday night after office hours. I am equally clear that for the notice of withdrawal to be effective it does not have to be served personally on the members of the tribunal or their clerk. It is plain however from the undisputed evidence that the notice of withdrawal was properly served before 9.30 on Monday morning, 24th November. The notice of withdrawal is properly served within a reasonable time of its reaching the office of the tribunal during office hours. I say 'within a reasonable time' because I do not think that the moment it goes through the letterbox, if minutes or hours count (and they might in some cases) would constitute service of the notice. The notice would be deemed to have been served when there had been a reasonable opportunity for the office staff in the ordinary course to have brought it to the attention of the clerk. We know that on this occasion he received that letter before 9.30 in the morning.

The only question to be decided—and it is not a particularly easy one—is whether before that notice was served on the Monday morning the tribunal had entered on a consideration of the tenant's application under Part VI of the Rent Act 1968 for a reduction in his rent. The tribunal consists, according to Sch 10, para 1, of the Act, of the chairman and two other members. I have no doubt that the clerk can be authorised by the tribunal to send notices and that he is authorised by them to receive notices on their behalf. I am convinced however that the tribunal has no power to delegate to their clerk the consideration of an application by a tenant or a landlord under this part of the Act, so in my view nothing that the clerk did can count as consideration of the application.

The evidence however shows that the chairman and two other members of the tribunal had, by Sunday night, 23rd November, considered the application and all the material that was then before them. I think it would be giving too artificial a construction to s 73 to come to the conclusion that by the Monday morning, each of the members having considered the application, the tribunal had not entered

on a consideration of it. It must be remembered that these tribunals act judicially of course, but quite informally. Counsel for the landlords has however persuasively argued before us that all that happened over the weekend was that the members of the tribunal were preparing to consider the application, but had not considered it. I am afraid that I cannot accept that argument. If, in order for the tribunal to consider the application, it was necessary for them to meet together, then of course counsel's argument would be unanswerable. In most cases of course there is a hearing and the tribunal does meet together. It is not however necessary that they should meet together or that there should be a hearing. For example, if neither party wants a hearing, or makes no representation in writing, and the tribunal either decides not to hold a view, as they may, or if it is impossible for them to hold a view, there is nothing in the Act that obliges them to meet together in one room for the purpose of considering the application. In the circumstances that I have postulated, which may be rare, but which could arise, they could consider the application, communicating with each other either in writing, or possibly by telephone, and unanimously come to the conclusion that on the material put before them such and such a conclusion was the only possible one at which to arrive. That being so I can see no reason why, within the meaning of these words in the Act, they did not 'enter upon a consideration' of the application when each of them, over the weekend considered the relevant facts and the documents before them, and indeed made a record of those facts.

I ought perhaps to add that I do not think that this view makes for any uncertainty. If for example the tenant, wishing to withdraw his application, were to telephone the clerk and say, 'Am I in time?', the clerk, had he not put the documents before the members of the tribunal, would reply, 'Yes, you are in time; the tribunal have not yet started to consider your application; they have not even seen it'. If however at the moment the tenant made that enquiry the clerk had sent the documents to each of the members of the tribunal, he would reply, 'I'm afraid I can't tell you. You may well be too late as I have put the papers before the tribunal. I will enquire from them whether or not they have considered your application. If they have, you are too late to withdraw it'.

I am quite satisfied that once each of the members of the tribunal had commenced to consider the application and the material before them, they had entered on a consideration of the application within the meaning of those words under s 73, and I would accordingly dismiss the appeal.

**MEGAW LJ:** Two questions are raised on this appeal. The first is: When is a withdrawal of a reference to be treated as having become effective?

The relevant facts in the present case are that the tenant, having written his notice on Friday, 21st November, put it through the letterbox of the offices of the tribunal either on the Friday evening or on the Saturday or the Sunday. If it was done on the Friday evening it was after office hours, and office hours do not extend to the Saturday or the Sunday. According to the evidence of Mr Chaplin, the clerk to the tribunal, in his affidavit, it would appear that the document constituting the notice of withdrawal was found, having come through the letterbox in the offices of the tribunal, early in the morning of Monday, 24th November, certainly before 9.30 am. It was properly brought to his attention, so that he had already seen it when the tenant, Mr Penn, telephoned him at 9.30 on that morning.

LORD DENNING MR has read the terms of the notice of withdrawal. I assume, for the purposes of this appeal, because the contrary has not been argued, that that document can indeed properly be regarded as having been a withdrawal within the meaning of the words 'the reference is . . . withdrawn by the party . . . who



made it' under s 73 (1) of the Act, notwithstanding that the tenant in that document says, whether rightly or wrongly, that he had to compromise and that he had to accept the landlords' offer as he was assured that he would be evicted if he let his application stand.

In my judgment a withdrawal is effective when it has been brought to the notice either of the members of the tribunal itself or to the notice of the duly authorised representative of the tribunal, i.e. duly authorised to receive such a notice. In this case that would plainly include the clerk. Further, I should regard such a notice of withdrawal as having been duly received and as being effective when it should, with proper administrative efficiency and diligence, have been brought to the attention either of the members of the tribunal or the duly authorised officer.

The other question that arises on this appeal is the question: At what point of time on the facts of this case, and generally, is the tribunal to be regarded as having entered on consideration of a reference made in accordance with s 72 (1) and (2) of the Act? I confess that in the course of the argument I was strongly attracted by the view that, reading s 72 (1) in its own words and in the context of the surrounding sections, and with Sch 10 to the Act, the tribunal should properly be regarded as having entered into the consideration of the reference at the time when the clerk to the tribunal, being duly authorised by the tribunal to that end, had given notice of the date and time of the proposed hearing by the tribunal, and had given notice of the intended visit by the tribunal to the premises in question. Those notices in this case were given to landlord and tenant on 13th November 1969. I observe that the notice given in respect of the fixing of the date of the hearing states that the tribunal are 'at present considering the application'.

However, I am persuaded in the end that there are powerful arguments against accepting the view that such an administrative act of the tribunal through its duly authorised officer is to be regarded for this purpose as sufficient. I agree with the conclusion at which LORD DENNING MR and SALMON LJ have arrived as to the time of entering on consideration of the reference. Accordingly, I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: Trott & Gentry; Solicitor, Ministry of Housing and Local Government.

G.F.L.B.

## COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, ROSKILL AND CAULFIELD, JJ)

6th July 1971

R. v WARD

*Criminal Law—Appeal—Application for leave—Refusal by single judge—Right to have application determined by full court—Time limit of 14 days—Extension of time—Power exercisable by any judge of the court—Exercise after expiration of 14 days—Criminal Appeal Act, 1968, s 31 (3)—Criminal Appeal Rules, 1968, r 12 (1), (4).*

By s 31 (3) of the Criminal Appeal Act, 1968: 'If the single judge refuses an application on the part of an appellant to exercise in his favour any of the powers above specified [including an application for leave to appeal against sentence] the appellant shall be entitled to have his application determined by the Court of Appeal.' By r 12 of the Criminal Rules, 1968: '(1) Where a judge of the court has refused an application on the part of an appellant to exercise in his favour any of the powers referred to in s 31 (2) of the Act, the appellant may have the application determined by the court by serving a notice in Form 15 on the registrar within 14 days, or such longer period as a judge of the court may fix, from the date on which notice of the refusal was served on him by the registrar . . . (4) If such a notice is not served on the registrar within the said 14 days or such longer period as a judge of the court may fix, the application shall be treated as having been refused by the court.'

The power to extend the time under r 12 (2) may be exercised either by the judge who heard the application or any other judge of the court, and whether or not the period of 14 days has already expired. But where an application has been abandoned, different considerations apply.

## APPLICATION for extension of time.

On 19th October 1970 at Essex Assizes the applicant, Daniel Stephen Ward, pleaded guilty to five counts of robbery and was sentenced by CRICHTON J to concurrent terms of ten years' imprisonment. On 13th November 1970 he applied for leave to appeal against sentence. On 3rd January 1971 this was refused by JAMES J under s 31 of the Criminal Appeal Act, 1968. On 7th January 1971 the applicant was informed of this decision. On 29th January 1971, he, not having renewed his application, was informed that the refusal by JAMES J was final by operation of r 12 (4) of the Criminal Appeal Rules, 1968. On 11th February 1971 the applicant requested the Registrar of Criminal Appeals to refer his application to the full court. On 7th May 1971 the court (LORD WIDGERY, CJ, FENTON ATKINSON, LJ and BRISTOW, J) adjourned the applicant's application.

*A F Waley* for the applicant.

*A D Green* for the Crown.

**LORD WIDGERY CJ** delivered this judgment of the court: At Essex Assizes in October 1970 before CRICHTON J the applicant, together with three other co-accused called Summers, Irons and Boxcer respectively, pleaded guilty to a number of counts of robbery. In the case of the applicant the plea was to all five counts; in the case of Irons and Boxcer to a lesser number. The four men were all sentenced to substantial terms of imprisonment. The applicant was sentenced to ten years' imprisonment, asking for 16 other offences to be taken into consideration. Summers was sentenced to seven years' imprisonment, Irons to five years' imprisonment, and Boxcer to five years' imprisonment. The applications for leave to appeal by Summers, Irons and Boxcer have already been disposed of by this court and all have been refused,

but a similar application with regard to the applicant was adjourned because it had a feature not common to the other applications.

Following on the applicant's application for leave to appeal against his sentence, which was received by the registrar of this court on 13th November 1970, the matter was considered by JAMES J as the single judge under the procedure in s 31 of the Criminal Appeal Act 1968. JAMES J refused the applicant Ward's application for leave to appeal against sentence, and on 7th January 1971, the applicant was informed that this decision had been reached. He was also informed, in accordance with the routine procedure, that he had 14 days in which to determine whether he would abandon his application for leave to appeal, or whether he would proceed to have it heard by the full court. The choice open to him existed by virtue of s 31 (3) of the Act, which provides:

'If the single judge refuses an application on the part of an appellant to exercise in his favour any of the powers above specified, the appellant shall be entitled to have the application determined by the Court of Appeal.'

The section contains no time limit within which the applicant shall signify his desire to have the matter determined by the full court, but that is dealt with by rules.

Rule 12 of the Criminal Appeal Rules 1968 provides in these terms:

'(1) Where a judge of the court has refused an application on the part of an appellant to exercise in his favour any of the powers referred to in section 31 (2) of the Act, the appellant may have the application determined by the court by serving a notice in Form 15 on the registrar within fourteen days, or such longer period as a judge of the court may fix, from the date on which notice of the refusal was served on him by the registrar.

'(2) A notice in Form 15 shall be signed by, or on behalf of, the appellant.

'(3) If the notice is not signed by the appellant and the appellant is in custody the registrar shall, as soon as practicable after receiving the notice, send a copy of it to the appellant.

'(4) If such a notice is not served on the registrar within the said 14 days or such longer period as a judge of the court may fix, the application shall be treated as having been refused by the court.'

Accordingly, on 7th January 1971, the applicant was properly informed by the registrar that he had 14 days, in effect, in which to make up his mind whether to have his application brought before the full court under s 31 or to abandon it. In fact the applicant did neither. He took no positive step consequent on that notice, and on 29th January, the period of 14 days having then passed, the applicant was notified that the refusal by the single judge took effect under r 12 (4), and that his application must now be regarded as refused by the court.

On 11th February 1971 the applicant wrote to the registrar, referred to his previous application, and used these words:

'Due to an extreme state of worry caused by my trial, subsequent sentence and failure of my appeal, I was neglectful in renewing my appeal by this given date (20.1.71). I now respectfully request that, although this application for leave to renew my appeal is 21 days late, it would please be acceptable even now. I regret the inconvenience caused to you by the error of delay on my part.'

So we get the applicant some 21 days out of time seeking to bring his application before the court under s 31. The reason why the applicant's case was not dealt with on the earlier occasion on which the court refused the applications of the other applicants was that it was thought necessary to go closely into the power of the court

to extend the time in which an application can be brought to the court if such application for an extension was made after the expiry of the original 14 days. Accordingly the applicant's application was adjourned until this day and the court is much indebted to counsel for the assistance which they have given.

The primary question which one must ask oneself in deciding whether the court retains power to extend the time in these circumstances is to ask whether that is the meaning and effect of the language in r 12. If the effect of the language in r 12 is to limit the court's exercise of the power, then there may be all manner of arguments about whether the rule is or is not *ultra vires*. One does not reach that point in considering the problem unless the language of the rule by itself would prevent the court from extending the time once the 14 days have already run. So we must first look again at the language of r 12 (1) and see whether it has that effect.

The first thing to be observed, in the judgment of the court, is that the longer period which may be fixed within which the applicant's application under s 31 is to be made is a period which may be fixed by a judge of the court. It is not, in our judgment, as a matter of construction right to take the view that the power to extend the time is a power residing only in the particular judge who refused the application in the first instance. No doubt it is open to that judge to extend the time in an appropriate case, but on the plain language of the rule we consider that a similar power is open to any judge of the court, and since each of the three of us is a judge of the court, each of the three of us enjoys the power of extending time given by r 12.

The next problem is to decide whether the power to extend the time evaporates at the end of the 14 days, or whether it can be exercised retrospectively after the 14 day period has expired. Again as a matter of construction of the rule we have come to the conclusion that there is no reason to restrict the period within which an extension may be sought to the period of 14 days initially mentioned. It is by no means uncommon, when a power to dispense with a time provision is given by statute, to provide that the extension may be effected whether it is applied for within or without the initial period of time. Indeed, as was pointed out in argument, under s 18 of the 1968 Act the provisions with regard to time in which the initial application for leave to appeal must be made are capable of extension by the court, and by s 18 (3) the time for giving notice may be extended either before or after it expires. We can see no reason why a similar approach should not be made to r 12, and accordingly we construe the rule as meaning that the time for making an application to bring a refusal before the full court under s 31 can be extended by any judge of the court, and can be extended at any time, that is to say, either before the 14 days period has expired, or after. Needless to say, the court's discretion will be affected by the circumstances in which the delay in making the application arose, but as a matter of jurisdiction we find no time limit in r 12 (1) to prevent the making of an application for an extension of the kind which counsel now seeks to make on behalf of the applicant.

It is appropriate, before passing on to the next stage of the argument, to observe that this conclusion seems to us to be in no way in conflict with the well settled practice of the court that where an applicant has abandoned his application, it is not open to the court to re-open the matter unless in the particular circumstances of the case the abandonment is shown to be no real abandonment at all. The attitude of the court to an abandoned application is a wholly different thing, and we are not of the opinion that the conclusion which I have just expressed on the meaning of r 12 (1) has any consequence at all in regard to abandonment cases.

Moving on, then, from the conclusion that the power exists in this court to extend the time, the next question is whether, as a matter of discretion, we ought to exercise the power in favour of the applicant. Of course, it is necessary that time limits

should be treated with respect, and in considering whether a time limit shall be extended, one has to have regard to the circumstances of the case and the merits of the excuse put forward for not adhering to the original limit in the first instance. The applicant's letter, which I have read in full, really gives no explanation of his being 21 days out of time in making the application. He clearly appreciated when served with the notice what his position was, and a long time had expired since the trial and since the initial post-trial shock might have worn off. We can really see nothing in the language used by the applicant to justify the exercise in his favour of the discretion which we are convinced we have, and the ultimate decision on this application will be that the court declines to extend the time under r 12 (1) within which the application to the court is to be made.

It is only right, however, before leaving the matter, to say that these offences were exceedingly grave offences, that the applicant on the face of the simple facts of the case was clearly more culpable than the other three, and it seems to this court that there was really no prospect of the applicant's sentence being reduced even if the application had been acceptable on the principles which I have described. But be that as it may, the decision of the court is to refuse the applicant's application for the extension of time under r 12 (1) to bring the matter before the full court.

*Application refused.*

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.

T.R.F.B.

#### COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, O'CONNOR AND LAWSON, JJ)

29th July 1971

R v DOHERTY

*Criminal Law—Appeal—Application for leave—Refusal by single judge—Right to have application determined by full court—Time limit of 14 days—Extension of time—Power rarely to be exercised—Criminal Appeal Act, 1968, s 31 (3)—Criminal Appeal Rules, 1968, r 12 (1), (4).*

Although there is power to extend the time within which an applicant whose application for leave to appeal has been refused by the single judge must renew his application to the full court, the power will rarely be exercised and only in a case out of the ordinary where the applicant has an excuse for not having renewed the application within the 14 days specified by r 12 of the Criminal Appeal Rules, 1968.

APPLICATION for leave to appeal against sentence.

On 17th February 1971 at Warwick Assizes the applicant, Lawrence Maynard Graham Doherty, was convicted of unlawful wounding and sentenced to two years' imprisonment. On 17th March 1971 he applied for leave to appeal against conviction and sentence. He abandoned his application against conviction on 19th March 1971 and, on 20th May 1971, his application against sentence was refused by PAULL, J. The applicant did not renew his application for leave to appeal against sentence within 14 days as required by r 12 of the Criminal Appeal Rules 1968. Later he applied for the time to be extended to allow him to renew his application.

The applicant did not appear.

**LORD WIDGERY CJ** delivered this judgment of the court: The applicant was convicted at Warwick Assizes on 17th February 1971 of unlawful wounding and he was sentenced to two years' imprisonment. On 17th March he gave notice of application for leave to appeal against conviction and sentence. On 19th March he abandoned his application for leave to appeal against conviction, but his application for leave to appeal against sentence was still in force.

This matter came before the single judge, PAULL, J, on 20th May 1971, when he refused the application for leave to appeal against sentence and ordered that 60 days of the time spent in custody was not to count towards that sentence. The applicant was notified of the single judge's decision, but did not renew his application to the full court within 14 days as required by r 12 of the Criminal Appeal Rules 1968. On 19th July he applied by letter to the registrar of this court, as the court understands it, for leave to withdraw the abandonment of his application for leave to appeal against conviction, and also seeking to renew his application for leave to appeal against sentence to the full court.

Meanwhile, on 6th July this court had decided as a matter of principle that it has jurisdiction to extend the time under r 12 within which an applicant must renew his application to have it heard by the full court. That is a decision in the case of *R v Ward* (1). The principle therefore is established that, although the applicant did not apply to have the matter referred to the full court within the 14 days prescribed by r 12, yet this court has power to extend that time if it thinks fit.

The question for us today therefore is whether we ought to exercise that power. The court would wish to say that in general principle the power to extend time under r 12 should be very rarely used. It must be remembered that before this question can arise the applicant must have given notice of his application for leave to appeal, the necessary transcripts and papers will have been prepared, the matter will have been before the single judge and the applicant will have received the single judge's decision. In those circumstances, as it seems to us, the situation will be very rare in which it is appropriate or proper to grant the applicant an extension of the 14 days which the rules prescribe in which he is to make his final decision.

The only issue which arises when an applicant seeks to extend the time is whether he has excuse for not having renewed within the specified 14 days, and only in cases quite out of the ordinary does this court contemplate that such an excuse will be forthcoming in such circumstances. Now the excuse put forward in this present case is that when the applicant received notice of the single judge's decision he sought an interview with the prison governor of the prison in which he was then serving his sentence and he says that he was advised by the prison governor that his proper course was not to renew his application to the court but to petition the Home Secretary. That he did petition the Home Secretary is clear. It is not possible for us in the circumstances to reach a positive conclusion whether he is telling the truth when he says that he was so advised by the prison governor, but we think in his case that we ought to give him the benefit of the doubt and assume that that is factually correct. On that assumption he has in our opinion an excuse for not having renewed his application within due time.

On those assumed facts he was misled and accordingly can justifiably come before this court and invite us to extend the time. In the exercise of our discretion we shall grant that application, that is to say, we shall extend the time under r 12 within which the matter may be referred to the full court until 21st August 1971. I should add that the extension of time so granted is confined to the application for leave to appeal against sentence. The application for leave to appeal against conviction has been abandoned and on the authorities there is no ground whatever on which the court could interfere with that.

*Application granted.*

(1) ante p, 585

T.R.F.B.



COURT OF APPEAL (CRIMINAL DIVISION)

(FENTON ATKINSON AND STEPHENSON, LJ AND LAWTON, J)

15th, 17th June 1971

R v HILTON

*Criminal Law—Evidence—Joint trial—Right of counsel for one defendant to cross-examine co-defendant—Need for evidence of co-defendant to be adverse to defendant.*

On a joint trial counsel for one of two or more co-defendants has the right to cross-examine a co-defendant who has given evidence whether or not such evidence has been in any way adverse to his client.

APPEAL by Keith Hilton against his conviction at Manchester Crown Court with nine others of aiding and abetting an affray, when he was sentenced to 18 months' imprisonment.

H A Kershaw for the appellant.

D M Sumner for the Crown.

*Cur adv vult*

17th June. FENTON ATKINSON LJ read this judgment of the court: The appellant was one of ten men convicted on 15th January 1971 before his Honour Judge Steel at Manchester Crown Court of aiding and abetting an affray. The appellant was sentenced to 18 months' imprisonment and the nine others were sentenced to various terms of imprisonment or Borstal training. They all appeal to this court on a point of law on certificate of the trial judge and we heard the appellant's case as a test case.

The case concerned an outrageous and terrifying affray when a gang of between 20 and 40 youths in leather suits arrived on their motor-cycles at a dance at a club in Bury. Not only did they smash up the premises where the dance was taking place, but they also used gross violence both to men and girls taking part in the dance. It was as bad a case of this kind as one could imagine.

Seven counsel appeared for the defence of these ten accused, one of the counsel representing four of the accused. Each of the accused had his own special points to raise in defence. The point in the case for consideration at this hearing arises in this way. The first accused gave evidence-in-chief in his own defence. In his evidence he was merely defending himself and his evidence in no way reflected adversely on any of his co-accused. At the end of his evidence-in-chief counsel for a number of the other accused wished to cross-examine in order to elicit matters favourable to their clients. At that stage the learned judge intervened and said: 'Has he said anything about your client?' and counsel said: 'There are matters I want to ask him.' The judge: 'Your right to cross-examine arises if he gives evidence which implicates your client'.

At this point counsel who was appearing for the appellant joined in the argument and from there on seems to have taken the leading part in pursuing the argument on behalf of all the counsel engaged in the case in order to avoid a multiplicity of submissions. The judge, however, said that in all the years he had been sitting in criminal courts he had always held that a co-accused only had the right to cross-examine another accused if that other accused gave evidence in some way adverse to the party wishing to cross-examine. He went on to point out that if any accused wished to have the support of a co-accused he could call him as a witness. Counsel for the appellant said that that might mean in the current case each accused being called into the witness box some 16 times, as there were originally 16 accused. The

judge remained firm in his ruling that there was no right at all to cross-examine the witness unless that witness had given evidence against the particular co-accused wishing to cross-examine. Counsel for the appellant returned to this submission on the following day, but the trial judge, adhered to his ruling and gave a careful and considered judgment to the effect already indicated. It is against that ruling that all the appellants now appeal on the certificate of the trial judge. All the counsel concerned have indicated that they had matters to put to various of the co-accused in the hope of eliciting matters favourable to their own clients.

In our view, the ruling of the judge was wrong. The experience of each member of this court, both at the Bar and on the Bench, is that counsel for one of two or more co-accused has for many years past invariably been allowed to cross-examine a co-accused who has given evidence whether or not such evidence was in any way adverse to his client. There was a time when such cross-examination had to be advanced with discretion if counsel wished to retain the right to the last word to the jury and it may be that in earlier days the practice of the criminal courts was what the commissioner has ruled that it still is (see e.g. *R v Hadwen* (1)) but we are all quite satisfied that the practice to allow such cross-examination is well established in our courts and that it is necessary for justice to be done.

This can be illustrated as follows. A and B are charged with an offence and are separately represented. A gives evidence in his own defence making no mention of B. B's counsel knows that there is in fact important evidence that A can give in B's favour. If he cannot elicit that matter in cross-examination he has no right to call A to give evidence a second time as A is not a compellable witness and may be unwilling for a number of reasons to give evidence for a second time. Clear though we believe the established practice to be, it is true, as Professor Cross points out in his book on Evidence (3rd Edn., 1967, p 212), that the only authority supporting the right to cross-examine in such cases consists of dicta in the House of Lords in *Murdoch v Taylor* (2) although such a rule has been recognised both in South Africa (see *State v Langa* (3)) and Rhodesia (see *Nyensi v R* (4)). On the other hand, there is Scots authority to the contrary in *Gemmel and M'Fadyen v MacNiven* (5). In *Murdoch v Taylor* (2), LORD MORRIS OF BORTH-Y-GEST said:

'It may be noted that if A and B are jointly charged with the same offence and if A chooses to give evidence which is purely in defence of himself and is not evidence against B he may be asked questions in cross-examination by B notwithstanding that such questions would tend to criminate him (A) as to the offence charged. In similar circumstances B would be likewise placed; but questions of the kind denoted by s 1 (f) of the Criminal Evidence Act, 1898, could not be put. No doubt during any such cross-examination a judge would be alert to protect a witness from being cajoled into saying more than it was ever his plan or wish or intention to say.'

LORD PEARCE took the same view. He said:

'Two obvious examples occur to one of situations in which the judge ought to use a discretion to refuse an accused's request to introduce a co-accused's bad character. The first is where that accused's counsel has deliberately led a co-accused into the trap, or has, for the purpose of bringing in his bad record, put questions to him in cross-examination which will compel him, for the sake of

(1) 66 JP 456; [1902] 1 KB 882.

(2) 129 JP 208; [1965] 1 All ER 406; [1965] AC 574.

(3) 1963 (4) SA 941.

(4) [1962] R & N 271.

(5) 1928 JC 5.

his own innocence, to give answers that will clash with the story of the other accused, or compel him to bring to the forefront implications which would otherwise have been unnoticed or immaterial.'

In that passage LORD PEARCE clearly assumes a right to cross-examine before evidence has been given against the client of the cross-examiner.

We agree entirely with the statement of the South African judge, HARCOURT J, in *State v Langa* (3), quoted by Professor Cross, when he said:

'An accused ought, if a fair trial is what is aimed at, to be at liberty to cross-examine a co-accused or any witness called by him who may not have inculpated him in any way in order to establish facts which may tend to support the alibi.'

In our view the right to question co-accused for which counsel were contending in this case was necessary for justice to be done. No doubt in such a situation counsel would be careful in framing their questions for fear that if couched in too leading a form the impression on the minds of the jury might be weakened, but we have no doubt that the right to such cross-examination existed and was wrongly refused in this case. Accordingly, as we have already announced, we allow the appeal of the appellant and also the nine other appeals, being all of the opinion that it is quite impossible to apply the proviso in the circumstances of this case.

*Conviction quashed.*

Solicitors: Registrar of Criminal Appeals; Fredk Howarth, Son & Maitland, Bury, Lancs.

T.R.F.B.

(3) 1963 (4) SA 941.

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### QUEEN'S BENCH DIVISION

(LORD PARKER, CJ, SACHS AND WIDGERY, JJ)

23 February 1966

BAKER v COLE

*Road Traffic—Disqualification—Mitigating circumstances—Personal circumstances—Circumstances concerned with the offence—Road Traffic Act 1962, s 5 (3).*

Mitigating circumstances which, under s 5 (3) of the Road Traffic Act, 1962, entitle a court to refrain from disqualifying from holding a licence an offender in whose case two previous convictions within the previous three years have been endorsed on his licence may include both circumstances personal to the offender (such as hardship and lack of public transport) and circumstances concerned with the offence, but the fact that the offender drove on an open road at a prohibited speed without involving any element of special danger cannot be a mitigating circumstance.

CASE STATED by justices for the county borough of Northampton

On 8th October 1965, the justices convicted the respondent, Derek Frederick Cole, of driving a motor vehicle on a restricted road at a speed exceeding 30 miles an hour, contrary to s 19 of the Road Traffic Act 1960. They fined the respondent and ordered his licence to be endorsed, but, although he had within the three years preceding the commission of the offence been convicted on two occasions of offences specified in Part II of Sch 1 to the Road Traffic Act 1962, they refused to disqualify him as,

in their view, there were mitigating grounds under s 5 (3) of the 1962 Act. The prosecutor Baker, appealed.

*David Barker* for the appellant.  
The respondent did not appear.

**LORD PARKER CJ:** This is an appeal by way of Case Stated from a decision of justices for the county borough of Northampton who convicted the respondent of driving a motor vehicle on a road being a restricted road at a speed exceeding 30 mph, contrary to s 19 of the Road Traffic Act 1960. They imposed a fine and ordered the respondent's licence to be endorsed and they refused to disqualify.

The matter had been dealt with under the special procedure whereby the respondent put in a plea of guilty, but when his licence was looked at it was found that within the previous three years he had already been convicted twice of offences specified in Part I or Part II of Sch 1 to the Road Traffic Act 1962. Section 5 (3) of that Act provides:

'Where a person convicted of an offence specified in the said Part I or the said Part II has within the three years immediately preceding the commission of the offence and since the commencement of this Act been convicted on not less than two occasions of an offence specified in those Parts, and particulars of the conviction have been ordered to be endorsed in accordance with s 7 of this Act, the court shall order him to be disqualified for such period not less than six months as the court thinks fit, unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction . . .'

That being the position, the justices adjourned the case for the attendance of the respondent, and when the matter was heard again they had the evidence of the respondent before them. They came to the conclusion that this was not a case for disqualification for a number of reasons:

'(a) That the respondent is a craftsman in the printing trade and his type of work is not readily available in any other works in Northampton. (b) That the respondent's printing job requires his attendance at work at times when public transport is not running. (c) That an accident suffered by the respondent disables him from riding a bicycle. (d) That the respondent cannot walk to his work because he lives too far away. (e) That the only means of transport which will enable the respondent to retain his job is motor transport. (f) That, if the respondent were disqualified from driving, this would be equivalent to dismissal from work and we considered this to be a special mitigating circumstance. (g) That the respondent's offence was to drive at a speed in excess of 30 m.p.h. That the road on which the offence was committed was a broad suburban highway and there was no suggestion in this case that the respondent drove without care or consideration for other road users or that there was any element of special danger in driving at a speed of 45 m.p.h.'

In my judgment, the justices were perfectly entitled to act as they did. It is true that the first six circumstances which they say they took into account are circumstances personal to the offender and not to the offence. Accordingly they would not rank as special reasons. As to that, it is to be observed that s 5 (3) is saying, not that there shall be disqualification unless the court for special reasons thinks otherwise, but that the court shall order him to be disqualified unless the court is satisfied that there are grounds for mitigating the normal consequence. It is quite clear that in the ordinary

way mitigating circumstances are largely circumstances pertaining to the offender, and the justices were perfectly entitled to take those matters into consideration. The seventh ground, however, is not a mitigating circumstance in the sense of being a circumstance particular to the offender but is more like a special reason. It has been suggested by counsel for the appellant that one can, as it were, put mitigating circumstances under s 5 (3) and special reasons which appear in s 5 (1), in, as it were, watertight compartments, and that something which is a special reason cannot be a mitigating circumstance. I see no ground for confining mitigating circumstances in that way. It seems to me that the circumstances concerned with the offence as opposed to the offender may equally be mitigating grounds.

Having said that, I would like to observe that the justices in considering matters such as the offence being committed on the open road, should give little if any weight to such a consideration, bearing in mind that the mischief aimed at by this subsection is the man who commits maybe a series of offences all comparatively trivial in themselves. Subject to that warning for the future, I think the justices were entitled to take into consideration all these matters and I would dismiss this appeal.

**SACHS J:** I agree and would only add an observation in relation to the last matters mentioned by LORD PARKER CJ. In this particular case there is nothing in the statement of facts before us to show what were the other offences for which the respondent had been convicted under Parts I or II of Sch 1 to the Road Traffic Act 1962. From the form, however, in which the Case is stated I would assume that those two offences were unlikely both to have been for exceeding the speed limit. Had this been a third case of exceeding the speed limit, and then the matter relied on as mitigating ground had been solely the one mentioned in s 5 (3), I for my part might well have hesitated before saying that it was something on which the justices could act. It seems to me that one always must look at the mischief of the Act and next at the particular offences which the person who is convicted had committed before the offence under consideration, as well as the offence under consideration itself. Then it may well be that there are occasions when to say simply in effect 'well, he did nothing worse than exceed the speed limit', is not of itself a mitigating ground in relation to a speed limit offence.

**WIDGERY J:** I also agree with the order proposed.

*Appeal dismissed.*

Solicitors: *Cummings, Marchant & Ashton*, for R C Beadon, Northampton.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, O'CONNOR AND LAWSON, JJ)

20th, 21st July 1971

WOODAGE v LAMBIE

*Road Traffic—Disqualification—Mitigating circumstances—Circumstances which may be considered—Triviality of previous convictions—Road Traffic Act, 1962, s 5 (3).*

The defendant pleaded guilty at a magistrates' court to driving a motor vehicle on a restricted road at a speed exceeding 30 miles an hour, contrary to s 4 of the Road Traffic Act 1960, and s 71 (1) of the Road Traffic Regulation Act 1967. During the three years immediately preceding the offence he had been convicted on two occasions of speeding offences and the convictions had been endorsed on his licence. Justices allowed him to adduce evidence to show that the two previous offences were of a trivial nature, involving speeds of 34 and 37 miles an hour respectively. On the basis of that evidence they held that there were mitigating grounds within the meaning of s 5 (3) of the Road Traffic Act, 1962, for not disqualifying the defendant. On appeal by the prosecutor,

HELD: (O'CONNOR, J. dissenting) as s 5 (3) of the Act of 1962 was aimed primarily, not at the gravity of the offences committed, but at the repetition of those offences during a comparatively short period, the relative triviality of the offences was not a matter to what weight should be given in deciding whether mitigating grounds existed: accordingly, in the present case the evidence tending to show the triviality of the previous offences should not have been admitted and the case must be remitted to the justices for reconsideration.

CASE STATED by Reading justices.

On 1st December 1970 an information was preferred by the appellant, Harold Woodage, against the respondent, Robert Lambie, charging that he on 15th November 1970 in the county borough of Reading drove a motor vehicle on restricted roads called Peppard Road and Buckingham Drive at a speed exceeding 30 miles per hour, contrary to s 4 of the Road Traffic Act 1960 and s 71 of the Road Traffic Regulation Act 1967.

At the hearing of the information at Reading Magistrates' Court on 4th January 1971 the respondent pleaded guilty, but the justices found that there were grounds for mitigating the normal consequences of the conviction under s 5 (3) of the Road Traffic Act 1962, and, therefore, thought fit not to order him to be disqualified. They fined him £20 and ordered his licence to be endorsed. The prosecutor appealed.

D H Farquharson for the appellant.

D Morton-Jack for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case Stated from justices for the county borough of Reading in respect of their adjudication as a magistrates' court at Reading on 5th January 1971. On that date an information was preferred by the appellant prosecutor against the respondent that he on 15th November 1970 in the county borough of Reading drove a motor vehicle on restricted roads at a speed exceeding 30 mph, contrary to s 4 of the Road Traffic Act 1960 and s 71 of the Road Traffic Regulation Act 1967.

The justices, having heard the case on a plea of guilty, were informed that the respondent had driven a motor vehicle on a restricted road at a speed of 50 mph, the appropriate limit I understand being 30 mph. Accordingly, a conviction was entered and it then appeared that the respondent had been convicted on two previous occasions of offences of speeding, and the question of his being subject to mandatory disqualification under the so-called totting up procedure in s 5 (3) of the Road Traffic



Act 1962 was considered by the justices. They found correctly that there were two previous speeding offences where an order had been made that the respondent's licence should be endorsed, and it was therefore evident that they had to consider the terms of s 5 (3) which provides:

'Where a person convicted of an offence specified in the said Part I or the said Part II has within the three years immediately preceding the commission of the offence and since the commencement of this Act been convicted on not less than two occasions of an offence specified in those Parts and particulars of the convictions have been ordered to be endorsed in accordance with section seven of this Act, the court shall order him to be disqualified for such period not less than six months as the court thinks fit, unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.'

So the necessary ground work had been laid, and the justices were required to disqualify for six months under that subsection unless they were satisfied, having regard to all the circumstances, that there were grounds for mitigating the normal consequences of the conviction.

The respondent sought to mitigate under the terms of that subsection by calling evidence as to the circumstances of his two preceding offences. In particular, he sought to give evidence that the speed at which he had been travelling on the two previous occasions was in one instance 34 mph and in the other instance 37 mph. His purpose obviously was to impress on the justices that the two previous offences had been of a relatively trivial kind and accordingly he was intending to use that material in mitigation under s 5 (3). Objection was taken before the justices by the appellant that they ought not to hear evidence from the respondent in regard to the circumstances of the two previous offences, but the justices concluded that such evidence was admissible, basing themselves I think largely on the fact that the subsection enjoins them to have regard to all the circumstances. They overruled the appellant's objection, they heard the evidence in regard to the earlier offences, and they decided that there were grounds for mitigating the normal consequences of the third conviction. They therefore determined not to order him to be disqualified under s 5 (3), and they used the following terms:

'In view of what you have told us about your two previous convictions we find there are mitigating grounds and we shall not disqualify you.'

The question which arises in this case is whether the justices came to a correct decision in law in holding that evidence of the circumstances attending the previous convictions of the respondent was admissible in determining whether there were grounds for mitigating the normal consequences of the commission of the subsequent offence. This is a section in constant application, it has been on the statute book for some nine years, but there is a perhaps remarkable lack of authority as to what are mitigating circumstances and how the court should face the question posed in the subsection if the offender seeks to mitigate. We have been referred to a decision in this court, *Baker v Cole* (1). It was heard on 23rd February 1966 and its principal interest, if I may so describe it, is its recognition that circumstances which amount to grounds for mitigation under s 5 (3) are not the same as circumstances which constitute special reasons in other parts of the same legislation. In particular, *Baker v Cole* recognises that circumstances peculiar to the offender rather than to the offence may amount to mitigating circumstances. That, however, is not the point with

(1) ante p. 592.

which we are concerned, and I refer to *Baker v Cole* for the words of LORD PARKER CJ with which he concludes his judgment when he said this:

'I would like to observe that the justices, in considering matters such as the offence being committed on the open road, should give little if any weight to such a consideration, bearing in mind that the mischief aimed at by this subsection is the man who commits maybe a series of offences all comparatively trivial in themselves.'

I would respectfully adopt that language with which I entirely agree. The road traffic legislation contains adequate powers to provide adequate periods of disqualification for those who commit serious traffic offences. I agree with LORD PARKER CJ in his view that s 5 (3) is primarily concerned with the man who does not commit serious offences but who commits offences very frequently. It is aimed not so much at the gravity of the offences committed but the repetition of those offences during a relatively short period. Consequently, in my judgment, the purpose of the subsection is to say to an offender who has committed two, albeit relatively trivial, offences within a short period: 'You must now be careful because if you commit another perhaps trivial offence within the three years prescribed by the subsection you are liable to have a six months' disqualification from driving.' If that is the proper way to look at it—and I am reinforced as I say by the fact that evidently it was LORD PARKER'S view of the proper way to look at it—the relative triviality of the three offences is not a matter to which weight should be given for the purposes of mitigation. I do not attempt to catalogue what are proper matters in mitigation, but I would observe that any matters which the offender can put forward as indicative of the third offence being contributed to by circumstances outside his control would be a mitigating circumstance for present purposes. Suppose on the third offence the offender says, 'I was provoked by another motorist; I would not have committed this offence but for the provocation', I can well see the justices might say, 'This is mitigation in the circumstances; this explains how it came about that he committed his third offence so quickly after the other two'. Again, if a doctor is convicted of a speeding offence and he says that he was going late at night to an urgent case, this is clearly a mitigating circumstance because it helps to excuse or justify the fact that he committed a third offence so quickly, and matters of that sort undoubtedly in my judgment are relevant to consider under the subsection. But for the reasons which I have endeavoured to give, the relative triviality of the first or the second or the third offence is not a matter to which weight should be given for the purposes of mitigation.

Accordingly, in my judgment the evidence tendered in this case which sought to show the triviality of the earlier offences was not admissible. Any possible concern which the justices may properly have on the third offence for the circumstances of the first and the second offences can be adequately met by the information which they obtain from the endorsement on the licence.

In my judgment, therefore, the correct disposal of the present appeal is to say to the justices that they were wrong in law in admitting this evidence, and I would then allow the appeal and send the matter back to the justices for reconsideration in the light of the opinion of this court.

**O'CONNOR J:** It is with diffidence that I have the misfortune to find that I am unable to agree with the result which LORD WIDGERY CJ has just pronounced. Section 5 (3) of the Road Traffic Act 1962 shows that the burden of satisfying the court that in all the circumstances there are grounds for mitigating the normal consequences of the conviction are on the defence, and in the present case after objection

by the prosecutor the respondent was permitted to give evidence as to the circumstances in which the two previous offences, which were both offences of speeding, had been committed, and the speeds involved. The appellant submits that such evidence cannot be adduced by a defendant in order to try and satisfy the court that in all the circumstances there are grounds for mitigating the consequences of his conviction and that if the court can look at the previous convictions at all it can only look at the particulars endorsed on the licence.

I find myself unable to accept this submission. The problem, as LORD WIDGERY has already referred to, was raised in this court in *Baker v Cole* (1), and I must look at that case in a little bit more detail. In that case the justices found that there were six matters which were peculiar to the offender and one matter, the last, which I read:

'that the respondent's offence was to drive at a speed in excess of 30 m.p.h. That the road on which the offence was committed was a broad suburban highway and there was no suggestion in this case that the respondent drove without care or consideration for other road users or that there was any element of special danger in driving at a speed of 45 m.p.h.'

It was pointed out by LORD PARKER CJ in the course of his judgment that:

'[This] ground is not a mitigating circumstance in the sense of being a circumstance particular to the offender but is more like a special reason. It has been suggested . . . that one can, as it were, put mitigating circumstances under s 5 (3) and special reasons which appear in s 5 (1) in, as it were, watertight compartments, and that something which is a special reason cannot be a mitigating circumstance. I see no ground for confining mitigating circumstances in that way. It seems to me that the circumstances concerned with the offence as opposed to the offender may equally be mitigating grounds.'

It is followed by the passage which LORD WIDGERY has already read. SACHS J, who was a member of the court, had this to say about it:

'It seems to me that one always must look at the mischief of the Act and next at the particular offences which the person who is convicted had committed before the offence under consideration, as well as the offence under consideration itself. Then it may well be that there are occasions when to say simply in effect "well, he did nothing worse than exceed the speed limit", is not of itself a mitigating ground in relation to a speed limit offence.'

Strictly that passage is obiter for the purpose of the decision in this case but I find myself in agreement with the construction which SACHS J put on the section.

I can give my reasons quite shortly. It is I think the law that before passing sentence for any criminal offence, the court must consider the nature of the offence and the antecedents of the defendant, including any propensity to similar offences, and the circumstances of the defendant, in order to arrive at the fair and just sentence in his case. As I understand the law and practice in criminal cases, it is always open to the convicted man to give any explanation as to his antecedents in order to mitigate the consequence of the instant offence of which he stands convicted. I look to see whether there is anything in the Road Traffic Act 1962, and particularly in s 5, which operates to deprive an accused convicted of an offence in Part I or Part II of Sch 1 of that Act of his right to give any explanation he wishes when his antecedents are under consideration. I can find nothing in the Act which so operates. If his antecedents will be before the court in order to assess what penalty other than disqualification is fair and just, which is inevitable, for my part I cannot see that the same antecedents

(1) ante p. 592.

together with any explanation of them which are properly before the court, can be excluded by the court when they come to consider whether in all the circumstances there are grounds for mitigating the normal consequences of the conviction. The use of the words 'having regard to all the circumstances' in s 5 (3) points clearly in my judgment the other way. For my part, I am not prepared to construe those words as if they read 'having regard to all the circumstances other than the circumstances of the two previous offences'. I would answer the question raised in this case that the evidence was admissible and I would dismiss the appeal.

I only wish to add that where the only matter relied upon by a person such as the respondent, convicted for the third time in three years of a speeding offence, are the circumstances of the three offences, it must be rare that a court should say that they are satisfied that in all the circumstances there are grounds for mitigating the normal consequences of the third conviction.

**LAWSON J:** I agree with LORD WIDGERY CJ, and with the reasons which he has given in his judgment. I would add that when the court has to exercise its discretionary power to mitigate or avoid the statutory consequences of a further conviction in cases to which s 5 (3) of the Road Traffic Act 1962 applies, it will have regard to all the relevant circumstances. In my judgment, these do not include the circumstances of the previous offences which have brought the subsection into operation. There are two particular reasons which move me to this conclusion. First, the scheme of the subsection is to attract the statutory consequences of a further conviction as an additional and, in principle, mandatory penalty for that offence. To that extent Parliament has circumscribed the exercise of the sentencing powers of the court as they are usually employed. There are precedents for this, for example in s 5 of the Vagrancy Act 1824, where a man having previously been convicted as a rogue and a vagabond is deemed to be an incorrigible rogue, and as an incorrigible rogue is dealt with by quarter sessions and exposed to a higher penalty.

The second reason is that the circumstances of the earlier offences will normally be taken into account when those offences were dealt with and will have been reflected in the penalties imposed for them.

I would therefore answer that the evidence in this case was wrongly admitted and I agree with the order proposed by LORD WIDGERY.

*Case remitted for reconsideration.*

Solicitors: Sharpe, Pritchard & Co, for J Malcolm Simons, Kidlington, Oxford; Wellbelove, Parmenter & Diamond, Reading.

T.R.F.B.

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, LYELL AND COOKE, JJ)

28th June 1971

## DENTON v JOHN LISTER LTD AND ANOTHER

*Customs and Excise—Importation of prohibited goods—Proceedings for forfeiture and condemnation—Allegation that defendants were importers—Proceedings in rem, not in personam—Customs and Excise Act, 1952, s 275, Sch 7.*

The defendant company, of which the second respondent was a director, dealt in postage stamps, specialising in Commonwealth issues. In or about 1964 the second respondent on behalf of the defendant company decided to compile a catalogue of stamps issued in the British Commonwealth in and after 1953. In or about 1964 and 1965 he wrote to the postal administrations in all Commonwealth countries (including Southern Rhodesia) asking for details of all stamps issued in or after 1953. Both before and after February, 1966, the Rhodesian post office sent the company samples of their new postage stamps. The stamps were sent free of charge and were used by the respondents solely for photographing and catalogue purposes. The respondents did not communicate with the Rhodesian post office about the matter after 1964. In November, 1969, the appellant, who was an officer of Customs and Excise, seized a number of these stamps. It was common ground that the stamps were, by the Import of Goods (Control) Order, 1954, as amended and the Southern Rhodesia (United Nations Sanctions) (No 2) Order, 1968, prohibited imports and as such liable to forfeiture under s 44 of the Customs and Excise Act, 1952. The appellant, in proceedings of forfeiture and condemnation pursuant to s 275 of Sched 7 to the Act of 1952, alleged in his complaint that the respondents had imported certain goods, namely, Rhodesian stamps, in mint condition originating in and consigned from Southern Rhodesia. On the hearing of the complaint the Chief Magistrate found that the stamps were imported and that such importation was prohibited, but that they had not been imported by the respondents. He, accordingly, dismissed the complaint. On appeal,

**HELD:** forfeiture proceedings under Sch 7 to the Act of 1952 were proceedings in rem and not in personam, i.e., that the issue which had to be dealt with was whether the goods in question were liable to be forfeited, and if so, the identity of the importer was not a relevant factor; accordingly, the fact that the information alleged that the respondents were the importers was surplusage and of no consequence; on his findings of fact the Chief Magistrate should have upheld the claim for forfeiture, and the case must be remitted to him with a direction that the order of forfeiture should be made.

CASE STATED by Sir Frank Milton, the Chief Metropolitan Magistrate.

On 16th September 1970 complaints were made by the appellant, Arthur Gilbert Denton (an officer of Customs and Excise), against the respondents, John Lister Ltd and John Thomas Frederick Lister, charging that on various dates unknown since 2nd February 1966 John Lister Ltd, of which company John Thomas Frederick Lister was a director, imported certain goods, namely, Rhodesian stamps in mint condition, originating in and consigned from Southern Rhodesia; that the importation of the goods was prohibited by the Import of Goods (Control) Order 1954 as amended by the Revocation of Import Licences (Southern Rhodesia) Order and made under the Import, Export and Customs Powers (Defence) Act 1939, and the Southern Rhodesia (United Nations Sanctions) (No 2) Order 1968; and that the goods were liable to forfeiture under s 44 of the Customs and Excise Act 1952.

On 10th and 14th November 1969 the goods were seized as being liable to forfeiture at 37 Bury Street, London, SW1, the registered office of the first respondent, in the presence of the second respondent. The respondents gave notice of claim that the goods were not liable to forfeiture, and the Commissioners of Customs and Excise ordered proceedings for forfeiture and condemnation of the goods pursuant to s 275 of and Sch 7 to the Customs and Excise Act 1952.

The Chief Magistrate was of the opinion that the stamps were imported and that the importation of the stamps was prohibited. He was also of the opinion that the stamps had not been imported by the respondents or by either of them. No request was made by the appellant to amend the summonses, but he indicated that, if such a request had been made, he would not, in the exercise of his discretion, have allowed it. He accordingly refused to make the order for which the appellant asked. The appellant appealed.

*Gordon Slyn* for the appellant.

The respondents did not appear.

**LORD WIDGERY CJ:** This is an appeal by Case Stated against the decision of the Chief Metropolitan Magistrate sitting at Bow Street on 12th November 1970 when he declined to make in favour of the appellant, an officer of Customs and Excise, an order for the forfeiture of certain goods alleged to have been irregularly imported into this country. Looking at the facts briefly as found by the Case Stated, they are these. The respondent company is a dealer in postage stamps and the individual respondent is a director of the company. The company has carried on business perfectly reputably as a stamp dealer for many years, specialising in the wholesale supply of new British Commonwealth stamps. In 1964, when import from Rhodesia was not subject to any special prohibition, and when a number of import licences were in circulation, the second respondent decided to compile a catalogue of stamps issued in the British Commonwealth, and to that end he wrote to the postal administration in all the Commonwealth countries, including Southern Rhodesia, asking for information about the stamps which had been issued in that area in and after 1953, and also seeking assistance to obtain examples of the stamps which could be photographed for the catalogue, or alternatively photographs of stamps which could be used to that end. The response seems to have been satisfactory, and both before and after 2nd February 1966 the Rhodesian post office sent samples of its new issues to the second respondent. The second respondent did not solicit any such samples after 1964, but, it having become the habit of the Rhodesian post office to supply him, such supply was maintained without his request after 2nd February 1966.

The relevance of 2nd February 1966 is that that was the day on which the Board of Trade cancelled the relevant import licences from Southern Rhodesia consequent on the troubles of which we all know affecting that country. These samples continued to arrive. In 1969 the appellant seized a number of stamps which had been imported from Rhodesia since 1966, and claimed under the procedure laid down that they should be forfeit as having been irregularly imported.

I go now to the procedure, which is to be found in the Customs and Excise Act 1952. Section 44 provides:

'Where . . . (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment: . . . these goods shall be liable to forfeiture . . .'

In reading that extract I have omitted the words not relevant to the present case. It is not in issue that after 1966 the import of these goods was contrary to a prohibition or restriction contained in an enactment. Where goods are thus improperly imported and become liable to forfeiture under s 44, there is a power of seizure conferred by s 275 (1) of the 1952 Act, which provides:

'Any thing liable to forfeiture under the customs or excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.'



When seizure thus takes place, the condemnation proceedings are regulated by Sch 7 to the 1952 Act. So, pausing there, we have on the facts found the seizure of these stamps, they arrived in this country by the means which I have described at a time when importation of such stamps was contrary to an enactment, and so the appellant's case was that he had seized them pursuant to s 275.

Then one goes to look at the procedure in Sch 7. The commissioners are required to give notice of the seizure to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof. The first step under para 1 of Sch 7 is to alert the owners to the fact that the goods have been seized. It is important, for reasons which will appear in a moment, in my judgment that no reference is there made in para 1 to the identity of the importer. The obligation to give notice is an obligation to give notice to the owner of the goods, regardless of whether he was the importer or not, or so it seems to me. I should add that in regard to goods obtained by post, which is a description applicable to the goods with which we are presently concerned, there is now an amendment whereby the notice under para 1 of Sch 7 shall be sent to the addressee of the postal packet, but again the same point is to be observed, that notice is given to the owner or addressee, not to the importer as such.

Then one finds in para 3 of Sch 7:

'Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners . . .'

So if the issue is to be raised that the thing detained is not liable to forfeiture, the claim making the allegation has to be made under para 3. If no such claim is made, and I am looking at para 5 of Sch 7, on the expiration of the relevant period the thing in question, i.e. the thing imported, shall be deemed to have been duly condemned as forfeit. But under para 6:

'Where notice of claim in respect of any thing is duly given in accordance with the foregoing provisions of this Schedule, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited.'

At the risk of repetition, I observe again that Sch 7 and the procedure which it lays down, is concerned, in my judgment, with the single issue of whether the article in question is liable to forfeiture under the Act or the Acts, because there may be others relevant in other cases. In this case the question whether the thing is liable to forfeiture under the Act is determined by the provisions of s 44, which I have read.

I must look at the information which gave rise to the proceedings before the chief magistrate. It is in no doubt a traditional form. It alleges that the goods in question, namely the stamps to which I have referred, were imported by the respondent company. It goes on to recite that the importation is prohibited by statute, and specifies the appropriate statutory regulations, which were not in issue, and then goes on to allege that the said goods are thus liable to forfeiture under s 44 of the 1952 Act. The summons then requires the respondents to be summoned to answer the said premises and to make defence thereto. Although in form the summons alleges that the respondents were the importers, there is no allegation of a criminal offence in this information, nor are the proceedings criminal proceedings against an importer. They are forfeiture proceedings under Sch 7 to the 1952 Act. The chief magistrate accepted the submission of the appellant that the stamps were imported stamps.

There had been some argument apparently to the effect that goods which were sent to this country unsolicited were not imported within the meaning of the legislation. The chief magistrate held that they were imported, and insofar as that is a decision of fact of course the decision is binding in any event. Insofar as it is a decision of law, I for my part entirely agree with it. He went on to make another important finding, namely that although the stamps had been imported, they had not been imported by the respondents or any of them, and again I with respect wholly support that conclusion, so far as it is a conclusion of law.

I think on the facts the receipt in this country of unsolicited stamps was certainly not an importation by the respondents, nor is there any attempt on behalf of the Crown to produce a contrary decision before us today. What seems to have troubled the chief magistrate is that the information contained, as I have said, an allegation that the importation had been done by the respondents, an allegation which he found to be ill-founded, and he concluded for reasons which I confess are not wholly clear from the case stated, that in the absence of an amendment of the information that would defeat the appellant's claim. He was not disposed to allow the amendment, and he dismissed the claim on that ground.

It seems to me quite clear that the forfeiture proceedings in Sch 7 are, as counsel for the appellant submits, proceedings in rem and not in personam, that is to say, the issue which is to be dealt with in forfeiture proceedings is whether the goods in question are liable to be forfeited. If they are liable to be forfeited then those proceedings are not interested in the identity of the person who imported them. Forfeiture or no depends on whether the goods were imported contrary to a prohibition. The identity of the importer is not a relevant factor, as I see it. Accordingly, in my judgment the fact that the information alleged that the respondents were the importers was surplusage. I would think perhaps in future the form of information might be amended to avoid the situation which has arisen in this case, but whether that be done or not for the future, the allegation in this information that the importers were the respondents was a piece of wholly unnecessary information surplus to the proceedings, and in my judgment was of no consequence at all. Accordingly I think that the chief magistrate on his own findings of fact should have upheld the claim for forfeiture made by the appellant. I would accordingly allow the appeal, and send the case back with a direction that the order for forfeiture should be made.

**LYELL J:** I agree.

**COOKE J:** I also entirely agree.

Solicitor: *Solicitor, Customs and Excise.*

*Case remitted.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, O'CONNOR AND LAWSON, JJ)

22nd, 23rd July 1971

BABBS v PRESS

*Shipping—Pilot—Pilotage district—Offer by licensed pilot—Offer to be made or communicated in relation to particular movement of ship—Simultaneous offer to number of ships—Pilotage Act, 1913, s 30 (3)—London Pilotage District Bye-Laws, Part IX, byelaw 2.*

By s 30 (3) of the Pilotage Act 1913: 'If in any pilotage district a pilot not licensed for the district pilots or attempts to pilot a ship after a pilot licensed for that district has offered to pilot the ship, he shall be liable [to a penalty].'

The respondent, a waterman licensed for the Gravesend reach of the Thames, but not a pilot licensed for the London pilotage district, piloted a vessel of 26,634 tons gross from Tilbury grain terminal to Tilbury landing stage approximately two nautical miles. He did this so that the ship could change moorings for repairs to be carried out. Both the terminal and the landing stage were within the London pilotage district. At the material time the Trinity House pilot station on the river at Gravesend had displayed on it a readily visible metal flag bearing the word 'pilots', which was intended as an offer of pilotage on behalf of the licensed pilots who were offering their services there. The pilot station was almost opposite to, and visible from, Tilbury landing stage, and there were at the material time licensed pilots available offering their services and ready, able and willing to pilot the ship in question. There was, however, no evidence that, while the respondent was piloting the ship, any licensed pilot had actually approached him and requested to supersede him, and, apart from any knowledge which the defendant might have had of the flag and its intended meaning and of the pilots at the pilot station, there was no direct evidence that he knew of any offer of pilotage. An information was preferred against the respondent charging him with an offence under s 30 (3) of the Act of 1913. The justices, who had no direct evidence of the precise course which the ship took or the distance which it actually travelled, found that there was no case for the respondent to answer on the ground (inter alia) that, while the flag at the pilot station would be a general offer of pilotage, there must be a specific offer by a licensed pilot, of which the respondent was aware, to constitute an offence under s 30 (3). They, accordingly, dismissed the information. On appeal by the prosecutor,

**HELD:** as the ship was 'being moved for the purpose of changing from one mooring to another', she was, by virtue of byelaw 2 of Part IX of the London Pilotage District Bye-Laws made under s 32 of the Pilotage Act, 1913, not to be deemed to be 'navigating in the district' and, accordingly, no question arose of her being under the control of a pilot whether licensed or unlicensed; the respondent, therefore, could not be guilty of an offence under s 30 (3) and the justices rightly dismissed the information.

**PER CURIAM:** An offer to provide pilotage for the purpose of s 30 (3) of the Act of 1913 must be an offer made or communicated in relation to the particular movement of the vessel in question. Whether or not in a given case an offer has been made relative to that particular movement of the vessel is a question of fact, and it is possible for an offer to be made simultaneously to a number of vessels at the same time. On the facts of the present case the justices were wholly justified in coming to the conclusion that there would be no sufficient offer.

**CASE STATED** by Gravesend justices.

On 9th July 1970 an information was preferred by the appellant, Edward Babbs, against the respondent, Bernard Press, charging that he on 14th February 1970, not being a pilot licensed for the district, piloted the motor vessel *Matilde* from Tilbury grain terminal to Tilbury landing stage within the limits of the London pilotage district after a pilot licensed for the district had offered to pilot the ship, contrary to s 30 (3) of the Pilotage Act 1913.

The justices dismissed the information, and the prosecutor appealed.

*S A Stamler QC and N Bridges-Adams* for the appellant.

*R F Stone QC and Geoffrey Brice* for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case Stated from justices for the borough of Gravesend in respect of an adjudication on 23rd September 1970 in which they held that the respondent, Bernard Press, had no case to answer on a charge brought against him under s 30 (3) of the Pilotage Act 1913 in these terms:

'that he on the 14th day of February, 1970, not being a pilot licensed for the district, piloted the m.v. Matilde from Tilbury Grain Terminal to Tilbury Landing Stage within the limits of the London Pilotage District after a pilot licensed for the district had offered to pilot the ship contrary to s 30 (3) ...'

I will read the subsection in question which provides:

'If in any pilotage district a pilot not licensed for the district pilots or attempts to pilot a ship after a pilot licensed for that district has offered to pilot the ship, he shall be liable in respect of each offence to a fine not exceeding fifty pounds.'

The facts found are these, that on the day in question, the respondent, who was a waterman licensed for Gravesend Reach of the River Thames but who was not a pilot licensed for the London pilotage district by Trinity House, nevertheless piloted the vessel in question from Tilbury grain terminal to Tilbury landing stage in order to change moorings for repairs to be carried out. She was not a small vessel; in fact she was registered in Monrovia with a gross tonnage of something over 26,000 tons. Tilbury grain terminal and Tilbury landing stage the justices found lie between Barking Creek and Gravesend and are within the said pilotage district. At all material times and for many years previous thereto, the Trinity House pilot station on the river at Gravesend had and had displayed on it apart from the word 'Pilots' a readily visible metal pilot flag intended as an offer of pilotage on behalf of the licensed pilots who were offering their services there. The pilot station is on the south side of the river, almost opposite to and visible from Tilbury landing stage. That makes it clear, as has been made clear to us by production of charts, that the pilot station referred to is on the bank of the river more or less at the point at which this particular movement of this ship terminated. The justices further found that at all material times there were licensed pilots available at the pilot station offering their services and ready, able and willing to pilot the Matilde as aforesaid. The distance between Tilbury grain terminal and Tilbury landing stage could be either a little more or a little less than two nautical miles according to how the calculation is made.

Those are the essential facts as found by the justices, and the issue arises in this way. Under the Pilotage Act 1913 provision is made in s 10 (1) that:

'Subject to the provisions of any Pilotage Order, pilotage shall continue to be compulsory in every pilotage district in which it was compulsory at the time of the passing of this Act ...'

So one gets the continued conception of a district or area where pilotage is compulsory. Section 11, which is the main provision, as I see it, giving effect to the compulsory character of pilotage in this area, provides:

'(1) Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship), while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be either—(a) under the pilotage of a licensed pilot of the district; or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship.

'(2) If any ship (other than an excepted ship) in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence to a fine . . .'

So far one has the obligation in sub-s (1) that the ship in such a district shall be under the pilotage of a licensed pilot or a master with similar qualifications, and in sub-s (2) one gets an offence committed if a ship which should be under pilotage is not so under pilotage after a licensed pilot has offered to take charge of the ship. It is important, in my judgment, to realise at the outset that the offence, in broad terms, of navigating without a licensed pilot can only arise after a licensed pilot has offered to take charge of the ship. Subsection (3) contains a list of excepted ships which are not subject to compulsory pilotage, and sub-s (4) contains power to make byelaws exempting certain types of ships, byelaws which in fact have been made.

I move from there to s 32 which has as a side note 'Provision as to ships within a harbour, dock etc.'

'(1) A ship while being moved within a harbour which forms part of a pilotage district shall be deemed to be a ship navigating in a pilotage district, except so far as may be provided by byelaw in the case of ships being so moved for the purpose of changing from one mooring to another mooring or of being taken into or out of any dock . . .'

The movement from one mooring to another was of course the precise movement which the *Matilde* was carrying out in this instance. Byelaws have been made pursuant to s 32, the relevant one being byelaw 2 of Part IX of the London Pilotage District Bye-Laws, and this reads:

'A ship while being moved for the purpose of changing from one mooring to another mooring or of being taken into or out of any dock in the part of the district between London Bridge and Gravesend shall not be deemed to be navigating in the district, and shall accordingly be exempt from compulsory pilotage provided that between Barking Creek and Gravesend the above exemption shall not apply to ships which are being moved for a distance exceeding two nautical miles.'

In the court below, the justices took the view that the question of whether the unlicensed character of the respondent in this case constituted an offence should be dependant on whether the movement in question was one exempted from compulsory pilotage under the byelaw which I have just read. It will be remembered that a distance, namely a distance exceeding two nautical miles, is relevant under that byelaw, and since the justices were unable to determine as a fact whether this particular movement was or was not more than two nautical miles they came to the conclusion that the case had not been made out on that ground, and that is the primary reason for their refusing to go on with the proceedings.

But in this court a number of other matters have been raised and indeed, as will appear in a moment, the justices themselves have made some helpful contribution on other matters as well. Two main arguments arise before us. First of all, it is contended by counsel for the respondent that, by virtue of s 32 and the byelaw made under it, not only was this particular movement excluded from the compulsory pilotage provisions of s 11, but it was really in effect taken out of the Act altogether, certainly taken out of the Act so as to prevent the operation of s 30 (3) to this case. Alternatively, if that is not right, counsel for the respondent contends that there was no offer by a licensed pilot of the kind contemplated by s 30 (3), so that in any event the piloting of this ship was not taking place after a pilot licensed for the



district had offered to pilot the ship. I will endeavour to deal with the considerations which arise under each of those contentions.

The first thing which I think is quite clear is that where a byelaw is made under s 32 and where in consequence of that byelaw a particular movement of a particular ship is not to be deemed to be navigating in the district, the result is to exempt the person acting as pilot and the master from the general obligations of compulsory pilotage under the Act. That is so because s 11, as I have already indicated, begins by applying the compulsory pilotage code to a case where a vessel is navigating in a pilotage district; hence if by virtue of the byelaw the ship is not navigating in a pilotage district, then the ordinary compulsory provisions in regard to a pilot do not apply. It is therefore quite clear that, in a case within the byelaws, a master of a ship could take the ship down the river or take charge of the movement and no offence would be committed, but although the effects of the byelaw would thus be to excuse the piloting of the ship by its master, or member of the crew, it is contended by counsel for the appellant that under s 30 if someone who is not a member of the crew takes charge of the ship then by virtue of s 30 (1) the right of a licensed pilot to supersede the unlicensed person and the obligation to make way for the licensed pilot arises. Section 30 (1) provides:

'A pilot licensed for a district may supersede any pilot not so licensed who is employed to pilot a ship in the district.'

Counsel for the respondent has conceded that so far, for example, as the excepted ships are concerned, if the master of an excepted ship who is not himself subject to compulsory pilotage restrictions chooses to employ an unlicensed pilot the result under s 30 (1) would be to enable a licensed pilot from Trinity House to supersede if he wished, and under sub-s (3) it would create an offence on the part of the master if having received the offer from the licensed pilot he rejected it. I ought also to read s 30 (4) which is of some materiality:

'If the master of a ship knowingly employs or continues to employ a pilot not licensed for the district to pilot the ship within any pilotage district after a pilot licensed for that district has offered to pilot the ship, or, in the case of an outward bound ship, without having taken reasonable steps (proof whereof shall lie on the master) to obtain a licensed pilot, he shall be liable in respect of each offence to a fine not exceeding fifty pounds.'

I return to counsel for the respondent's argument based on s 32. Recognising as he does that in cases where pilotage is not compulsory there may nevertheless be the right of supersession under s 30 if an unlicensed pilot is employed, he contends that by virtue of the byelaw there is no such restriction on unlicensed pilots operating within the terms of the byelaw itself. He draws attention to the fact that the effect of the byelaw is that a vessel moving from one mooring to another, as in the present case, shall not be deemed to be navigating in the district, and he contends that if a ship is not navigating then no question of her being piloted can arise. This part of his argument does not derive specifically from the terms of the statute, but derives from a common and normal use of language. He says that before anyone can be a pilot (who is defined in s 742 of the Merchant Shipping Act 1894 as a person not belonging to a ship who has the conduct thereof) the ship must be navigating. The ship must be in a condition in which a pilot has some function to perform. Accordingly he argues that if by virtue of the byelaw this particular ship is not deemed to be navigating in the district at all, then no one in charge of her, be it master or anyone else, can be a pilot within the meaning of the legislation. He says that this is the result of a Parliamentary attempt to recognise certain established rights in the river



which existed in such people as the watermen, and so the result of the argument to which I have already alluded is that in the absence of any navigation by the ship the existence of a pilot for present purposes does not arise at all. Accordingly he says that to apply s 30 (3) to this case is to assume that an unlicensed pilot is piloting the ship when in fact such an operation is impossible by virtue of the terms of the byelaw and the fact that the ship is not being navigated for present purposes.

Counsel for the appellant sought to meet this by contending that, on a true construction of the byelaws, the only effect of coming within the byelaw exemption is to release the parties concerned from the obligations for compulsory pilotage under the earlier provisions of the Act. He drew attention to the similarity of language in s 11 to that in s 32 and in the byelaw, and maintains that although the byelaw takes this movement out of the compulsory pilotage provisions it does not exempt the master and the unlicensed pilot from their obligation under s 30 any more than an unlicensed pilot would be exempted who was for the time being in control of an excepted ship.

The point is a very short one and to some extent, in my view, it is a matter of impression, but I have come to the conclusion that counsel for the respondent's argument on this is right. I think that as a matter of common sense one ought to take the view that if, as in the present case, the ship is not navigating in the district at all, then no question of it being under the control of the pilot can arise and no distinction therefore falls to be made between unlicensed pilots and licensed pilots in this regard.

That conclusion by itself is enough to dispose of this case, but we have had an interesting and helpful argument on the second point which I referred to, and I think it is right therefore to express certain views on that, although they must necessarily be obiter. In this Act, as I see it—and I think that counsel agree—one has running through a general proposition that it is the duty of the pilot to seek out the ship rather than the ship to seek out the pilot. Even where the full rigours of compulsory pilotage apply it is provided, as I have already said, in s 11 that the obligation to take on a licensed pilot does not arise until the offer of a licensed pilot has been made, and one can well see the good sense of that, particularly in 1913 when wireless telegraphy was in its infancy, because one might well ask how could a master of a ship approaching a port provide himself with a pilot unless a pilot came forward and offered his services. So one does get I think this important principle that the pilot must seek out the ship and not the ship seek out the pilot. In other words, I do not think that this Act contemplates a situation in which the pilots merely advertise their availability, following on which it is the duty of the master to find them. Indeed, if that were so, it would be difficult to understand the purpose of s 30 (4) which I have already read. An extremely sensible exception was made in the subsection, whereby the master of an outward bound ship has got to take steps to get a pilot before he leaves. The reason for that no doubt is that the pilots cannot know just when the ship is going to sail and cannot be standing by with an offer of pilotage indefinitely. But in all other instances, the reverse applies and it seems to me that, if the appellant is right in saying that, it is the law that by establishing this base opposite the landing stage, flying a pilot's flag from that base and publishing up and down the river that pilots are there available, and by virtue of that they issue in effect a global invitation, a global offer, to all masters requiring pilots, that they are available, that would in fact be putting the obligation of finding a pilot on the master instead of in the opposite direction, and in my judgment it is not open to Trinity House to support a general offer in those wide terms and circumstances. In my judgment, an offer for the purposes of s 30 (3) must be an offer made or communicated in relation to the particular movement of the vessel which is in question here.

Whether or not in a given case an offer has been made relative to the particular movement of the vessel will of course be a question of fact. I recognise that in many instances an offer may be made simultaneously to a number of vessels at the same time. One visualises a pilot cutter going out from a port, flying the appropriate signals to indicate that it is a pilot cutter, and thereby in effect offering to every passing master the services of a pilot on board a cutter. I am not suggesting that it is not possible for an offer to be made simultaneously to a number of ships in the vicinity, but when one comes to look at the facts of this case I think that the justices were wholly justified in reaching the conclusion which they did, that the presence of the pilot station and its flag two miles down the river was not a sufficient offer to the master of the *Matilde* of a licensed pilot at the time when she set off on this short two-mile voyage. To take the contrary view, as I have already said, would be to place the obligation of finding a pilot on the master and I have no doubt that on the facts which the justices have found they were correct in taking the view that no sufficient offer relative to the movement had been made at the time when the *Matilde* set off under the control of the respondent. It has been argued faintly that even if that were so, the offer presented by the pilot station became an effective offer when the ship got near enough to be within its range, as it were. Well, this is a matter which I do not feel disposed to pursue in the present case in view of the fact that the issue is really already decided on the first point. I would only say that it seems to me somewhat unreal if a ship leaving a point two miles up river, in circumstances when in my judgment no offer of pilotage had been made, is in some way required to become subject to such an offer when the movement concluded at the point, certainly not after the point, at which the pilot station has been established. However, I say no more about that because, in my judgment, the case ought really to be determined on the first issue. On that first issue I think the justices reached a proper conclusion and I would therefore dismiss the appeal.

**O'CONNOR J:** I agree.

**LAWSON J:** I also agree.

*Appeal dismissed.*

Solicitors: *Freshfields; Ingledew, Brown, Bennison & Garrett.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(WIDGERY, CJ, O'CONNOR AND LAWSON, JJ)

20th July 1971

R v DACORUM GAMING LICENSING COMMITTEE,  
EX PARTE EMI CINEMAS AND LEISURE LTD

*Gaming—Licensing of 'club'—Bingo—Application—Notice—Notice stating that applications made sent to editor of newspaper in proper form—Misprint relating to name of club in notice as printed—Validity—Gaming Act, 1968, Sch 2, para 6.*

The applicants wished to obtain under the Gaming Act, 1968, a bingo club licence for the 'ABC Social Club'. They instructed the editor of a newspaper circulating in the licensing authority's area to publish a notice stating that the application for the licence had been made. The phraseology of the notice precisely complied with the requirements of Sch 2, para 6 (2), to the Act and the name of club was correctly stated. When the notice was published in the newspaper it contained a misprint, the name of the club being given as the 'ABE Social Club'. The gaming licensing committee were of opinion that the misprint rendered the notice ineffective, that the applicants had not carried out the proper procedure under the Act, and that they (the committee) had no jurisdiction to hear the application. On a motion by the applicants for an order of mandamus directing the committee to hear and determine the application,

HELD: although the code contained in paras 5 to 7 of Sch 2 was intended to be, and should be, strictly enforced, it was none the less reasonable that, as the trifling typographical error in the present case was not in any sense the fault of the applicants and could not have misled anybody, it should not invalidate the notice or deprive the licensing committee of jurisdiction to hear the application; mandamus would, therefore, issue.

MOTION by EMI Cinemas and Leisure Ltd for an order of mandamus directed to the gaming committee for the Dacorum division of Hertfordshire requiring them to hear and determine an application for the grant of a licence under Part II of the Gaming Act 1968 in respect of the ABC Social Club at Berkhamsted

*D W T Price* for the applicants.

*G C F Forrester* as *amicus curiae*.

**LORD WIDGERY CJ:** In these proceedings counsel for the applicants moves for an order of mandamus directed to the justices forming the gaming licensing committee for the Dacorum petty sessional division in the county of Hertfordshire, requiring them to hear and determine an application for the grant of a Part II licence in respect of the ABC Social Club at the Rex Cinema, High Street, Berkhamsted, according to law.

The point is an exceedingly short one and arises in this way. Under Sch 2 to the Gaming Act 1968, certain requirements have to be fulfilled by any applicant for a licence under the Act. The relevant requirements are these. Paragraph 6 provides:

'(1) At any time in March in the year in which such an application is made, the applicant shall cause notice of the making of the application to be published by means of an advertisement in a newspaper circulating in the licensing authority's area.

'(2) A notice published in pursuance of this paragraph shall specify the name of the applicant, the name of the club and the location of the relevant premises, shall indicate whether the application is for a bingo club licence or for a licence under this Act other than a bingo club licence, and shall state that any person who desires to object to the grant of the licence should send to the clerk to the

licensing authority, before 15th April, two copies of a brief statement in writing of the grounds of his objection.'

Now with that paragraph very much in mind, the solicitor acting for the applicants wrote to the editor of a newspaper circulating in the licensing authority's area and required him—invited him, asked him—to publish a notice in the following form. The text as submitted by the solicitor said:

'Notice is hereby given that an application under the Gaming Act 1968 has been made by E.M.I. Cinemas and Leisure Limited for the purposes of the Club named A.B.C. Social Club in respect of the premises consisting of the ground floor and balcony of the Rex Cinema, High Street, Berkhamsted in the county of Hertford for a Bingo Club Licence. Any person who desires to object to the grant of the Licence should send to the Clerk to the Gaming Licensing Committee for the Petty Sessional Division of Dacorum in the said County before the 15th April 1971 two copies of a brief statement in writing of the grounds of his objection.'

The phraseology of that notice transmitted by the solicitor to the newspaper perfectly and precisely complied with the requirements of Sch 2, para 6 (2), to the 1968 Act, but unfortunately, as is bound to happen from time to time in the best ordered newspaper circles, the advertisement as printed in the paper contained a misprint, and the misprint was that when it referred to the club, instead of saying as the solicitor's notice had said 'the club named A.B.C. Social Club', the newspaper printed it as 'the club named A.B.E. Social Club'. It is said that that misprint renders the notice ineffective, and if the notice is ineffective the applicants have not carried out the proper procedure under the Act, and accordingly on that basis the justices would be right to refuse, as they did, to hear the application. They took the view that that was a defect in the notice which deprived them of jurisdiction.

They had not in fact seen the latest pronouncement of this court on this topic, *R v Leicester Gaming Licensing Committee, ex parte Shine* (1), a case decided in this court on 26th May 1971. I do not take time to go into the precise point which arose in that case, save to say that it was another case in which the advertisement was claimed to be defective, but it was a case in which the departure of the advertisement in the paper from the proper advertisement was a very much more marked departure than in the present instance. I said in that case at the end of my judgment:

'I think that we should take the view . . . that such a code [i.e. the code in paras 5 to 7 of Sch 2] is intended to be strictly enforced, and that a departure from the code prima facie renders a step in the procedure in which the error is made an ineffective step. I can see no justification for taking a different view in the present case, and I am not disposed to follow counsel for the applicants in his submission that the only purpose of para 6 (4) is to enable a prosecution to follow if an over-elaborate notice is given under para 6 (2). I think that Parliament intended this code to be strictly enforced, and I think it should be strictly enforced and I would accordingly refuse this application.'

I read that to make it perfectly clear that I wholly adhere to every word which I said in that judgment. This is a code which indeed should be strictly enforced. But there must be reason in all things and where there is a trifling typographical error of this kind which was not in any sense the fault of the applicants and which cannot possibly have misled anybody, I would myself take the view that such an error does not invalidate the notice, and accordingly did not in this instance deprive the

(1) Ante p. 473

gaming licensing justices of jurisdiction to consider the application. I would say that the order of mandamus should go.

O'CONNOR J: I agree.

LAWSON J: I agree.

*Order for mandamus.*

Solicitors: *Edgley & Co*, for *Cole & Cole*, Oxford; *Pickworth, Lloyd & Steel*, Hemel Hempstead.

T.R.F.B

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QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, O'CONNOR AND LAWSON, JJ)

20th July 1971

R v BRADFIELD AND SONNING JUSTICES. Ex parte HOLDSWORTH.

*Road Traffic—Driving while disqualified—Conviction—Period of earlier disqualification expired—New period of disqualification imposed—Additional period imposed under 'totting up' procedure—Application for removal of both periods—Jurisdiction of justices—Disqualification 'for an additional period in consequence of a conviction of an offence under s 110 (b) of the Road Traffic Act, 1960'—Road Traffic (Disqualification) Act, 1970, s 2 (1).*

By s 2 (1) of the Road Traffic (Disqualification) Act, 1970: 'Any person who by an order of a court made before the commencement of this Act is, in pursuance of s 5 (5) of the Road Traffic Act, 1962, disqualified for an additional period in consequence of a conviction of an offence under s. 110 (b) of the Road Traffic Act, 1960, may apply for the removal of the disqualification ...'

On January 23rd, 1970, the defendant was convicted of driving a motor vehicle while he was disqualified for holding or obtaining a licence, contrary to s 110 (b) of the Road Traffic Act, 1960. At the time of the conviction an earlier disqualification had expired. He was sentenced to 12 months' disqualification for the offence under s 110 (b) of the Act of 1960 and to a further consecutive period of six months under the 'totting up' procedure in accordance with s 5 (3) and s 5 (5) of the Road Traffic Act, 1962. In January, 1971 he applied to justices under s 2 (1) of the Act of 1971, for the removal of both periods of disqualification, and the justices ordered their removal. On a motion by the chief constable of the area for certiorari, to bring up the justices' order to be quashed,

HELD: the justices had no jurisdiction to remove either period, for (i) the 12-months' period could not be described as 'an additional period' within the meaning of s 2 (1) of the Act of 1971 as at the time of conviction the defendant was not subject to any period of disqualification, and (ii) the six-months period, though an additional period, was not, within the meaning of s 2 (1), a disqualification imposed 'in consequence of a conviction under s 110 (b) of the Road Traffic Act, 1960', since it had been imposed in consequence of, inter alia, the 'totting-up' procedure contained in s 5 (3) of the Act of 1962; certiorari must, therefore, issue to quash the order of the justices.

MOTION by David Holdsworth, the chief constable of the Thames Valley Constabulary, for an order of certiorari to remove into the High Court to be quashed an order made by justices for Bradfield and Sonning, Berkshire, by which it was ordered that disqualifications previously imposed on the respondent, Alan Reginald Rivers,

for holding or obtaining a driving licence under Part II of the Road Traffic Act 1960 for periods of 12 months and six months consecutively by the Bradfield justices should be removed.

*D H Farquharson* for the applicant.

The respondent did not appear.

**LORD WIDGERY CJ:** In these proceedings, counsel moves on behalf of the applicant, the chief constable of the Thames Valley Constabulary, for an order of certiorari to remove into this court for the purpose of it being quashed an order made by the justices for the petty sessional division of Bradfield and Sonning in the county of Berkshire on 8th January 1971 whereby it was ordered that disqualifications imposed on the respondent, Alan Reginald Rivers, for holding or obtaining a licence to drive a motor vehicle under Part II of the Road Traffic Act 1960 for consecutive periods should be removed.

This is a short but important point in that very difficult sphere of disqualification from driving, and the circumstances in which such disqualification may properly be removed. I should say at once, for my part, that I have every sympathy with the justices, who have clearly made every effort to produce the correct answer to this problem, though in fact for the reasons which will appear in a moment in my opinion they have failed.

The vital facts are these. On 23rd January 1970 the respondent was disqualified for driving a motor vehicle for a period of 12 months. The disqualification was in consequence of an offence of driving a motor vehicle while disqualified. In addition to being disqualified for 12 months in respect of that offence, he was subject to a further six-month period of disqualification under what is popularly called the totting up procedure, namely, the provisions of s 5 (3) of the Road Traffic Act 1962. Although the offence was one of driving while disqualified and although there had been a period of disqualification in respect of an offence, there was on 23rd January 1970 no outstanding disqualification at all. In other words, the previous disqualification had spent itself before the offence was before the court and before the further periods of disqualification to which I referred were imposed.

The position in January 1970 was that disqualification for offences of this kind depended on s 5 of the Road Traffic Act 1962 and, putting it in brief, a person convicted of the offence of driving while disqualified was subject to a mandatory further disqualification of 12 months. The mandatory disqualification came under s 5 (1), and the obligation to make it additional or consecutive came under s 5 (5) which provided:

*"The period of any disqualification imposed under subsection (3) of this section or on a conviction of an offence under paragraph (b) of section one hundred and ten of the principal Act (driving while disqualified) shall be in addition to any other period of disqualification imposed (whether previously or on the same occasion) under this section or under the principal Act or an enactment repealed by that Act..."*

[The words in italics were repealed by the Road Traffic (Disqualification) Act 1970, s 1 (2).]

So at the time when this story begins and the respondent was before the court on 23rd January 1970 the only circumstances in which a consecutive disqualification could properly be imposed were either for an offence of driving while disqualified or under the totting up procedure. In those circumstances the disqualification could



be and indeed had to be consecutive. In fact concern had been expressed for some time at cases coming before the court where the so-called compulsive driver drives when he is disqualified and goes on driving while disqualified, and under the provisions to which I have referred often built up an enormous period of disqualification for the future, periods which really had no reality in them at all, and so Parliament in 1970 by the Road Traffic (Disqualification) Act 1970 first of all provided that it should no longer be mandatory to impose a disqualification when the offence itself was driving while disqualified, and further removed the words in s 5 (5) which would require any such disqualification which was imposed to be consecutive to any other period.

The court is not so much concerned with those provisions which were for the future, but with the provisions in s 2 of the 1970 Act which were intended to provide a measure of relief for those already subject to consecutive periods of disqualification imposed under s 5 of the principal Act. What s 2 (1) provides is this:

'Any person who by an order of a court made before the commencement of this Act is, in pursuance of section 5 (5) of the Road Traffic Act 1962, disqualified for an additional period in consequence of a conviction of an offence under section 110 (b) of the Road Traffic Act 1960 may apply for the removal of the disqualification . . .'

In other words, within the somewhat restricted terms of the section there is power for a person disqualified by an order made before the Act was passed to go to the court and, as a discretionary power, for the court to remove the disqualification.

What happened in the respondent's case was that he went to the court relying on s 2 (1) and asking that the two periods of disqualification imposed on him on 23rd January 1970 should be removed. It was argued before the justices that in the terms of the section there was no power to give this relief to the respondent. The justices took a different view and it is now for us to decide which is right.

I go back to s 2 (1) of the 1970 Act. In order that the justices can have power to remove a disqualification, a number of conditions must be satisfied. First of all, the disqualification must be in consequence of a conviction for an offence of driving whilst disqualified. The discretionary power to give relief is clearly limited to a period of disqualification imposed in consequence of a conviction of an offence of driving whilst disqualified. Secondly, it is perfectly clear that the power of removal applies to disqualification for an additional period and those words take one straight back to the language of s 5 (5) of the 1962 Act where, as I have already pointed out, there was a requirement that on a conviction for driving while disqualified the offender should be disqualified for a period in addition to any other period of disqualification. So in order to see whether the justices correctly assumed jurisdiction in this case one has to go back and ask oneself whether both or either of these disqualification orders was an additional period of disqualification in consequence of a conviction for an offence under s 110. One observes first of all that on 23rd January 1970 the respondent was not subject to any period of disqualification at all. Accordingly, so it seems to me, the period of 12 months' disqualification imposed on him on that occasion cannot be described as an additional period. The purpose of the 1970 Act, in my judgment, was to strike out the cumulative effect of one disqualification being imposed on another. Here at the relevant time, namely when the disqualification was imposed, he was not subject to any period of disqualification and accordingly it seems to me that the imposition of a 12 months' disqualification on that occasion was not the imposition of a disqualification for an additional period. On that basis, it would seem to me that the justices were wrong in assuming jurisdiction to remove that disqualification.

When one comes to the other six months, this was imposed on the same occasion in respect of the same offence, but under the totting up procedure s 5 (3) this was an additional period of disqualification in the sense that it took effect consecutive to or in addition to the other period of 12 months then imposed. The question however still arises whether a disqualification under the totting up procedure, under s 5 (3), is imposed in consequence of a conviction of an offence under s 110. In my judgment it does not come within those words. I construe s 2 (1) of the 1970 Act as not extending to a period of disqualification which was imposed solely under the totting up procedure of s 5 (3). I do not regard a period of disqualification so imposed, although it is additional to any other period, as a disqualification imposed in consequence of a conviction under s 110. It is imposed in consequence of, amongst other things, the totting up procedure itself.

Accordingly, I find counsel's argument entirely convincing and I would allow the order of certiorari to go.

**O'CONNOR J:** Like LORD WIDGERY I have great sympathy for the justices who had to consider this matter. I can well understand how they came to fall into error, but for the reasons given by LORD WIDGERY, I agree the order should go.

**LAWSON J:** I agree.

*Order for certiorari.*

Solicitors: Sharpe, Pritchard & Co, for J Malcolm Simons, Kidlington, Oxford.

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, O'CONNOR AND LAWSON, JJ)

26th July 1971

FRANKLIN v LANGDOWN

*Road Traffic—School crossing—Exhibition of prescribed sign—Duty of driver to stop—Vehicle to be stopped 'so as not to impede [children] crossing'—Driver proceeding while sign still exhibited, but after children had crossed crown of the road—Road Traffic Regulation Act, 1967, s 25 (1), (2).*

Section 25 (2) (a) of the Road Traffic Regulation Act 1967, provides that a motorist required to stop at a place where children are crossing a road on their way to school by a school crossing patrol displaying the prescribed sign 'shall cause the vehicle to stop before reaching the place where the children are crossing or seeking to cross and so as not to stop or impede their crossing.'

The defendant was charged with failing to stop after being required to do so by a school crossing patrol exhibiting a prescribed sign, contrary to s 25 (1) of the Act of 1967. A school crossing patrol on duty near a road junction held up a 'Stop: Children' sign to enable a party of two or three women with children to cross the road. When the first members of the party had reached the opposite pavement, the last of the children was over the crown of the road, and the last of the adults was in the centre of the road, and the patrol was still holding up the stop sign, a car driven by the respondent came out of a side turning and passed behind the last of the adults, causing her to hasten her steps. Justices dismissed the information on the ground that the defendant had not acted so as to impede children crossing. On appeal by the prosecutor,

HELD: the words 'and so as not to stop or impede [the children's] crossing' were merely descriptive of the manner in which the driver should stop; once the sign had been properly exhibited, the driver must stop until, in accordance with s 25 (2), the sign ceased to be exhibited; the respondent in the present case had committed an offence against s 25 and the case must be remitted to the justices with a direction to convict.

CASE STATED by justices for the borough of Andover.

An information was preferred by the appellant, Ernest George Franklin, against the respondent, Victor George Langdown, charging that he on 5th November 1970 at Andover, being a person approaching a place at 8.55 am where children on their way to school were crossing or seeking to cross the road and having been required to stop by a school crossing patrol exhibiting a prescribed sign, did fail to cause his vehicle to stop before reaching the place where the children were crossing or seeking to cross so as not to stop or impede their crossing, contrary to s 25 of the Road Traffic Regulation Act 1967.

The justices held that s 25 of the Road Traffic Regulation Act 1967 related solely to children, and, as the children in the present case were clear of the respondent's lane before he reached the crossing, there was no obligation for him to stop, as by proceeding he neither impeded nor stopped their passage. The only person who might have been inconvenienced was an adult. The case was almost identical with *R v Greenwood* (1). Accordingly, no offence had been committed, they dismissed the information, and the prosecutor appealed.

*J A C Spokes* for the appellant.

*R N Titheridge* for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case Stated from justices for the borough of Andover who on 25th January 1971 dismissed an information preferred by the appellant against the respondent alleging that the respondent at Andover, being a person approaching a place at 8.55 am where children on their way to school were crossing the road and having been required to stop by a school crossing patrol exhibiting a prescribed sign, did fail to cause his vehicle to stop before reaching the place where the children were crossing or seeking to cross so as not to stop or impede their crossing, contrary to s 25 of the Road Traffic Regulation Act 1967.

The facts of the case were that at 8.55 am on 5th November 1970 a school crossing patrol in uniform was on duty in Salisbury Road, Andover. The children were going to school as one would understand at that time, and she was responsible for operating the school crossing. She saw a party of women and children approaching the crossing and she walked to the centre of the road, held up the prescribed 'Stop: Children' sign and then a party of two or three women with children began to cross the road. They crossed the nearside lane facing Salisbury and when the first members of this party were safely on the pavement on the far side of the road, the last of the children was over the crown of the road and the last of the adults in the centre of the road, a car driven by the respondent came out of a side turning and passed behind the last adult in the line, causing her to hasten her steps. Throughout this time the school crossing patrol continued to hold the said sign to require the driver of any vehicle that might approach to stop.

So there are extremely simple facts, the women and the children crossing a school crossing and at the time when the respondent comes along in his car some of the children are safely across and on the far pavement, some of the children have crossed half the road, but not yet completed the manoeuvre, and finally one has this lady who was at the rear of the party, as one might say, who was just about on the crown of the road. The driver comes through notwithstanding the exhibition of the

'Stop: Children' sign and drives near enough to the last lady in the party to cause her to hasten her steps. That is what the justices found.

The question whether in those circumstances the respondent committed an offence can only be determined by a careful look at the relevant legislation which is now s 25 of the Road Traffic Regulation Act 1967. This provides:

'(1) When between the hours of eight in the morning and half-past five in the afternoon a vehicle is approaching a place in a road where children on their way to or from school are crossing or seeking to cross the road, a school crossing patrol wearing a uniform approved by the Secretary of State shall have power, by exhibiting a prescribed sign, to require the person driving or propelling the vehicle to stop it. (2) When a person has been required under subs. (1) above to stop a vehicle—(a) he shall cause the vehicle to stop before reaching the place where the children are crossing or seeking to cross and so as not to stop or impede their crossing; and (b) the vehicle shall not be put in motion again so as to reach the place in question so long as the sign continues to be exhibited ...'

Subsection (2) goes on to provide that anyone who fails to comply with those requirements commits an offence. The contest below was as to the true meaning of s 25 (2) (a) which I will read again. It specifies the duty of the person driving the car:

'he shall cause the vehicle to stop before reaching the place where the children are crossing or seeking to cross and so as not to stop or impede their crossing ...'

The argument in favour of the driver, the respondent, was that no offence was committed by him unless the manner of his driving was such as to stop or impede the children from crossing the road. In other words, he said: 'By the time I got there the children had all crossed my half of the road, some were already on the pavement and the others who were still in the carriageway had passed beyond the side of the road on which I was travelling'. Hence he said: 'My activity in proceeding with the car did not stop or impede the crossing of the children'. That was his argument. The argument for the appellant was that the provisions of the section must be read in a different way. The section, according to counsel for the appellant's argument, simply means that the driver must stop, and everything else in s 25 (2) (a) is concerned with a description of the manner in which he must stop. So the argument is that the effect of the subsection is to cause the driver to stop before reaching the place where the children are crossing or seeking to cross and so as not to stop or impede their crossing. In other words, it is contended that all those words are merely describing the manner in which he must stop, he must stop before reaching the place where the children are crossing, and with his motor car in such a situation as not to stop or impede their crossing.

Quite evidently if the respondent's argument was right, he was properly acquitted below, whereas if the appellant's argument is right he ought to have been convicted, because the time had not come on that construction of the section when he could lawfully proceed.

The justices found the answer to this question, or so they thought, in an earlier decision of this court in *R v Greenwood* (1). It is a very short report and I should read it.

'The defendant was driving a bus towards a school crossing where a crossing patrol was on duty. He was charged with failing to stop before the crossing,

(1) [1962] Crim LR 639.

contrary to section 48 of the Road Traffic Act, 1960. The justices found that, as the defendant approached, the patrol escorted three children across the street; they reached the far side and the patrol then started to return, still exhibiting the prescribed sign. The defendant drove so close to the patrol that the bus brushed her coat. The justices were of opinion that the defendant was probably guilty of careless or reckless driving, but that he was not, in the circumstances, under a duty to stop and, accordingly, had not committed the offence charged.'

On appeal this court dismissed the appeal and said:

'that the plain words of the Act were that the driver's only duty was to stop before the place "where children are crossing or seeking to cross so as not to stop or impede their crossing". If there were no such children, or they had reached the other side of the road, there could be no question of impeding their crossing. Although under the Act a driver who had had to stop could not start again while the patrol's sign was exhibited, this did not apply to a driver who had merely had to slow down, or not slowed down at all. The justices were right to dismiss the information.'

It is to be observed that that decision is based on the fact that in that case there were no children on the road at the material time at all. They had all reached the place of safety on the far pavement, and the court there observed that, if there were no children whose crossing could be impeded, then there could be no question of an offence being committed. I would observe first in relation to *R v Greenwood* that the facts in the present case are quite different. The facts in the present case, as I have already emphasised, are that some of the children were still in the process of crossing at the time when the alleged offence was committed. Accordingly, it is not possible to dismiss the present case as *R v Greenwood* was dismissed merely by stating the proposition that in the absence of any children on the roadway no offence could be committed. For my part, I would add that I have the gravest doubts whether this court's approach in *R v Greenwood* was right. I would construe the section as counsel for the appellant has construed it today. In my judgment, the reference to 'and so as not to stop or impede their crossing' in s 2 (1) (a) is merely descriptive of the manner in which the driver should stop. My reading of the section therefore is that once the sign has been properly exhibited in accordance with sub-s (1) the driver must stop, unless indeed by the time he reaches the crossing the prescribed sign has already been removed. Of course, if he approaches slowly and the warden has taken the sign down before he gets there, naturally he can proceed. But if the sign is still exhibited there is, in my judgment, an obligation to stop which obligation cannot be released until s 25 (2) (b) has been satisfied, namely, that the sign no longer continues to be exhibited.

In my opinion, in this case the justices were wrong in the conclusion which they reached, although I have much sympathy for them. They failed to appreciate the difference in the facts of the present case when compared with *R v Greenwood*. If they had appreciated the true facts of the present case they would have realised that *R v Greenwood* did not require them to reach the conclusion that they did. I would therefore allow the appeal and send the case back to the justices with a direction to convict.

**O'CONNOR J:** I agree with the proposed order and in view of the decision in *R v Greenwood* I expressly agree with what LORD WIDGERY CJ has said about the construction of this section of the statute. I too have the gravest doubts whether

*R v Greenwood* was correctly decided, if the report really means that the court decided the way in which it is submitted by counsel for the respondent that it did.

**LAWSON J:** I agree with both judgments which have been delivered.

*Appeal allowed.*

Solicitors: *Theodore Goddard & Co*, for *P K L Danks*, Winchester; *Trethowen & Bullen*, Andover.

T.R.F.B.

### HOUSE OF LORDS

(LORD GUEST, LORD PARKER OF WADDINGTON, LORD WILBERFORCE, LORD SIMON OF GLAISDALE AND LORD CROSS OF CHELSEA)

27th, 28th July, 21st October 1971

#### SELBY v DIRECTOR OF PUBLIC PROSECUTIONS

*Criminal Law—Coinage offence—Possession of counterfeit coin with intent to utter—Need to prove intention to utter as genuine currency—Currency Offences Act, 1935, s 5 (3).*

By s 5 (3) of the Coinage Offences Act, 1936: 'Every person who has in his possession three or more false or counterfeit coins resembling any current gold or silver coin, knowing them to be false or counterfeit and with intent to utter or put off the said coins or any of them, shall be guilty of a misdemeanour . . .'

HELD (by LORD PARKER OF WADDINGTON, LORD WILBERFORCE and LORD CROSS OF CHELSEA, LORD GUEST and LORD SIMON OF GLAISDALE dissenting): the sub-section, being a penal enactment, should be construed strictly, and a person could not be convicted of an offence under it unless it was established that he intended to utter or put off counterfeit coins in his possession as genuine currency; a person who sold the coins without any intention to deceive and declaring that they were imitations was not liable to conviction.

APPEAL by Arthur John Selby against an order of the Court of Appeal dismissing his appeal against his conviction at Inner London Quarter Sessions of having in his possession 45 false or counterfeit coins resembling current gold coins, knowing them to be false or counterfeit and with intent to utter them or put them off, contrary to s 5 (3) of the Coinage Offences Act 1936.

*R M G Simpson QC* and *C A A Nicholls* for the appellant.

*H J Leonard QC* and *E M Hill* for the Crown.

Their Lordships took time for consideration.

21st October. The following opinions were delivered.

**LORD GUEST:** The appellant was convicted at the Inner London Sessions in September 1970 of an offence under s 5 (3) of the Coinage Offences Act 1936. The charge was that he had in his possession 45 false or counterfeit coins resembling current gold coins, knowing the same to be false or counterfeit, and with intent to utter or put off the coins or any of them. He was sentenced by the deputy chairman to two years' imprisonment. His appeal to the Court of Appeal, Criminal Division, was dismissed on 1st April 1971. The court gave a certificate that a point of law of general public importance was involved, namely: What is the meaning



of 'intent to utter' within s 5 (3) of the Coinage Offences Act 1936? and gave leave to appeal to this House.

At the trial there was no dispute that the appellant was in possession of the 45 coins, that those coins were false or counterfeit resembling current gold coins, and that the appellant knew that they were false or counterfeit. But the appellant's counsel submitted that there was no evidence of intent to utter or put off the coins and that there was accordingly no case to answer. The deputy chairman overruled the submission and the appellant was convicted. The only evidence as to the appellant's intent depended on his statement to the police officer who arrested him. When asked what he did with the coins, his statement amounted to this, that he dealt in these coins for his living. He denied having uttered them with intent to deceive. 'I always say they are imitations.' The deputy chairman held that this was no defence to the charge and directed the jury to that effect. The Court of Appeal, Criminal Division approved of the deputy chairman's direction to the jury. The court held that in order to prove an intent to utter it was not necessary to establish that the appellant intended to pass off the counterfeit coins as genuine currency and that it was sufficient proof of intent to utter that he intended to part with the coins for any purpose and in any circumstances.

The Coinage Act 1936 contains a number of provisions. Section 1 makes it an offence to falsely make or counterfeit any coin resembling any current coin. Section 2 deals with the impairment of gold or silver coins. Section 4 (1) makes it an offence to deface any current coins. Subsection (2) provides:

'A tender of payment in money made in any coin which has been defaced as aforesaid shall not be legal tender.'

Section 4 (3) provides that any person who tenders, utters or puts off any defaced coin shall be guilty of an offence. Section 5 is in the following terms:

'(1) Every person who tenders, utters or puts off any false or counterfeit coin resembling any current coin knowing it to be false or counterfeit, shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment for a term not exceeding one year . . .

'(3) Every person who has in his possession three or more false or counterfeit coins resembling any current gold or silver coin, knowing them to be false or counterfeit and with intent to utter or put off the said coins or any of them, shall be guilty of a misdemeanour and on conviction thereof liable to penal servitude for a term not exceeding five years or less than three years.'

'(6) Every person who, with intent to defraud, tenders, utters or puts off as or for any current gold or silver coin—(a) any coin not being that current coin and being of less value than that current coin; or (b) any medal or piece of metal or mixed metals resembling in size, figure and colour that current coin and being of less value than that current coin; shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment for a term not exceeding one year.'

'(7) The offence of tendering, uttering or putting off a false or counterfeit coin shall be deemed to be complete although the coin is not in a fit state to be uttered or the counterfeiting thereof has not been finished or perfected.'

The first question to which I must address myself is: What in the context of s 5 (3) is the meaning of 'intent to utter'. Does it require that there shall be an intention to pass the counterfeit coin as current coin of the realm, or is it sufficient that there shall be an intention to part with the coin in any circumstances? The first meaning involves an element of deceit or fraud. The elementary point which must strike

the construer is that the contrast is between a person who merely has the coins in his possession and a person who not only has the coins in his possession but also intends to part with them in some way or other. The first is not criminal, the second may be, depending on the meaning of 'intent to utter'. The next question is: What is the meaning of the words 'tenders, utters or puts off' in s 5 (1)? The words 'utters or puts off' must have the same meaning in sub-s (3) which relates to possession. The meaning of 'tenders' is fairly clear. It must mean 'offers in payment'. This is made plain by s 4 (2) which speaks of 'a tender of payment in money made in any coin which has been defaced' not being legal tender. What about 'utters or puts off'? They cannot have the same meaning as 'tenders' which has already been provided for. In its natural meaning 'utters' comprises the issuing out of the control of the possessor, such as 'publishing a libel'. 'Puts off' might suggest the parting of possession possibly with the added concept of deception. But the expression 'puts off as or for any current gold or silver coin' which occurs in s 5 (6) is coupled with an intent to defraud suggesting that in sub-s (1) intent to defraud is not necessary. 'Uttering', in my view, in the context means parting with possession with no element of deceit.

The appellant's construction of 'uttering' must involve an element of deceit or fraud in passing off the coin as current coin of the realm. This element of fraud is requisite for an offence under s 5 (6)—'every person who, with intent to defraud . . .' I see no necessity for importing into sub-s (3) an intent to defraud which is not present in the statute and I decline to read those words into the section. To do so would involve the tautologous expression in s 5 (6): 'Every person who, with intent to defraud, tenders, utters or puts off'—in my view an impossible construction. There is no special reason why 'intent to defraud' should be mentioned in sub-s (6).

It appears to me that the appellant's construction of s 5 in regard to the meaning of 'uttering' would ignore the mischief at which the Coinage Offences Act 1936 is aimed. It is the manufacture and circulation of coins resembling current coin with the consequent damage to the currency of the realm. As a matter of pure construction I have no doubt as to the meaning of 'utter' in s 5. It must mean put into circulation for any purpose and in any circumstances.

I now ask the question: Is there anything in the coinage legislation or in the authorities which would lead to a different conclusion? The history of the legislation goes back to the Statute of Treason 1351 whereby counterfeiting the King's seals or money or importing counterfeit money into the realm was made a treasonable offence punishable with death. There followed a number of statutes dealing with foreign coins, i.e., 1 Mary c 6 (1553), 1 & 2 Phil & Mar c 11 (1554), 14 Eliz c 3 (1570), which required an element of falsity or fraud relative to the offence. Counterfeiting was still a treasonable offence by 8 & 9 Geo 3 c 26.

There is no doubt that prior to 1742 uttering counterfeit coins was not a statutory offence. It was treated as cheating at common law (see *East's Pleas of the Crown*: vol 1, p 178; *Russell on Crimes*, vol. 2, p 1508). The precedents of indictments over this period include the words 'deceitfully' or 'with intent to defraud'. The most significant example appears in *Starkie's Criminal Pleading* (1938, p 561), where the words used are 'as and for a piece of good lawful and current coin unlawfully unjustly and deceitfully did utter'. But in 1742 by 15 Geo 2 c 28 s II it was provided:

'And whereas the uttering of false money, knowing it to be false, is a crime frequently committed all over the Kingdom, and the offenders therein are not deterred, by reason that it is only a misdemeanor, and the punishment very often is but small, though there be great reason to believe that the common utterers of such false money are either themselves the coiners, or in confederacy with the coiners thereof: for preventing whereof, Be it hereby further enacted by the authority aforesaid, that if any person whatsoever shall, after the said

twenty-ninth day of September, utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons, and shall be thereof convicted, such persons so offending shall suffer six months imprisonment . . .'

It is noticeable that in the first instance where 'uttering or tendering in payment' is made a statutory offence there is no requirement of intent to defraud. In s 5 (6) of the Coinage Offences Act 1936 (the predecessor of which was s 13 of the Coinage Offences Act 1861) an intent to defraud is required. The omission in the 1742 Act of intent to defraud is most significant.

The appellant contends that when 'uttering' was made a statutory offence in 1742 the word was imported from the common law with its element of cheating and consequently an intent to defraud was implied. This is to some extent supported by the fact that in indictments subsequent to 1742 the requirement of intent to defraud is alleged, as, for example, in *R v Tandy* (1), 'as for a good piece of money'; and see also Archbold's Criminal Pleading (2nd edn., 1825, p 277). This fact is by no means conclusive and the maxim *communis error facit lex* cannot apply to pleading. It may well be that this practice was a hangover from the days of the common law offence of cheating and practitioners continued to follow the old style. As against this practice it is noteworthy that the Indictments Act 1915, in the appendix to the rules in Sch 1, form 19, for an offence of 'uttering' under the Coinage Offences Act 1861, contains no mention of intent to defraud, whereas form 18 'uttering a forged document' does contain the words 'intent to defraud'. The practice cannot, therefore, have been consistent. It is unlikely that the form for uttering counterfeit coins would omit fraud, if it was a necessary element in the offence.

In 1832 the first consolidating statute relating to coinage offences was passed which repealed all existing legislation. Uttering, tendering or putting off were the offences in s vii. In s viii, for the first time, the possession of counterfeit coins knowing them to be counterfeit and with intent to utter, was made an offence—the forerunner of s 5 (3) of the 1936 Act. This had not previously been an offence at common law (*R v Stock* (2); *R v Heath* (3)).

The cases following the 1832 statute are instructive. In *R v Page* (4) LORD ABINGER CB held that the giving of a piece of money in charity was not an offence under the 1832 Act, because it was not done with intent to defraud. But in *R v Ion* (5) ALDERSON B, on being referred to LORD ABINGER's judgment, bluntly observed: 'This is overruled.' In *R v Sutton* (6) it was no offence against 37 Geo 3 c 126 if the coin was to be circulated abroad.

In 1861 the Coinage Offences Act further consolidated the law relating to coinage offences. Section 11 dealing with possession is the forerunner of s 5 (3) of the 1936 Act. Section 13 of the 1861 Act introduced a new provision which is now contained in s 5 (6) of the 1936 Act. It is an offence for a person who with intent to defraud tenders, utters or puts off as or for any current coin not being that current coin and being of less value than that coin or any medal or piece of metal resembling the current coin and being of less value than current coin.

For the sake of completeness it is only necessary to mention s 8 of the 1936 Act. This section provides that any person who without lawful authority or excuse makes, sells, offers for sale or has in his possession any medal, cast, coin or other thing made

(1) (1799), 2 Leach 833.

(2) (1810), Russ & Ry 185.

(3) (1810), Russ & Ry 184.

(4) (1837), 8 C & P 122.

(5) (1852), 16 JP 455.

(6) (1841), 5 JP 195.

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<b>CRIMINAL LAW</b> - Vagrancy - Indecent exposure with intent to insult female - Exposure in private room - Vagrancy Act, 1824, s 4, as amended by Criminal Justice Act, 1925, s 42.		
<b>Ford v Falcone</b> .. .. .	QBD	451
<b>CRIMINAL LAW</b> - Venue - Indictable offence - Place where defendant 'in custody' - 'Custody' - Criminal Justice Act, 1925, s 11 (1).		
<b>R v Kulynyecz</b> .. .. .	CA	82
<b>CUSTOMS AND EXCISE</b> - Being knowingly concerned in fraudulent evasion of restriction - Importation of cannabis - Offence and penalty created by Customs and Excise Act, 1952 - Restriction on importation imposed by Dangerous Drugs Act, 1965 - Proceedings on indictment under Customs and Excise Act 1952, s 304 - Need of leave of Attorney-General or Director of Public Prosecutions under s 20 of Dangerous Drugs Act, 1965		
<b>R v Williams</b> .. .. .	CA	359
<b>CUSTOMS AND EXCISE</b> - Importation of prohibited goods - Proceedings for forfeiture and condemnation - Allegation that defendants were importers - Proceedings in rem, not in personam - Customs and Excise Act, 1952, s 275, Sch 7.		
<b>Denton v John Lister Ltd</b> .. .. .	QBD	600
<b>CUSTOMS AND EXCISE</b> - Knowingly signing false declaration on Customs form - Exemption from customs duty - Person 'resident outside the United Kingdom' - Residence outside United Kingdom for not less than 12 months during previous 24 months - Meaning of 'resident' - Reference to number of days spent outside United Kingdom - Customs and Excise Act, 1952, s 301 - Customs Duty (Personal Reliefs) Order, 1970 (SI 1970, No 55), arts 2 (2), 5.		
<b>Brokelman v Barr</b> .. .. .	QBD	510
<b>CUSTOMS AND EXCISE</b> - Knowingly signing false declaration on Customs form - Person entering United Kingdom - 'Anything contained in his baggage or carried with him' - Carriage in vessel - Motor car purchased abroad - Finance Act, 1968, s 6 (1).		
<b>Brokelman v Barr</b> .. .. .	QBD	510
<b>DANGEROUS DRUGS</b> - Occupier permitting premises to be used for smoking cannabis - 'Permitting' - Reasonable grounds for suspicion - Failure to take reasonable steps readily available to prevent prohibited act - Dangerous Drugs Act, 1965, s 5 (a).		
<b>R v Souter</b> .. .. .	CA	458
<b>EDUCATION</b> - Administrative duty of authority - Allocation of pupils to certain schools - Wishes of parents - Complaint to Minister - Education Act, 1944, s 68, s 76.		
<b>Cumings v Birkenhead Corporation</b> .. .. .	CA	422
<b>EDUCATION</b> - Teacher - Contract of employment - Refusal to obey order - Right of authority to repudiate contract - Non-observance of regulations regarding dismissal and suspension.		
<b>Gorse v Durham County Council</b> .. .. .	QBD	389
<b>EVIDENCE</b> - Crown privilege - Application to Gaming Board for certificate for consent - Request to board by police on character and reputation of applicant - Letter from police giving information - Alleged criminal libel - Information necessary for proper functioning of board - Overriding public interest for non-disclosure.		
<b>R v Lewes Justices. Ex parte Gaming Board of Great Britain</b> .. .. .	QBD	442
<b>EXTRADITION</b> - Ireland - Order by magistrate in England - Duty to inquire into merits of charges - Prosecution for political offence if order made - Backing of Warrants (Republic of Ireland) Act, 1965, s 2 (1) (2) (b).		
<b>Keane v Governor of Brixton Prison</b> .. .. .	HL	240

of metal resembling in size, figure or colour any current gold or silver coin shall be guilty of a misdemeanour. It was suggested by appellant's counsel that this was the appropriate section under which the appellant might have been charged for having in his possession without lawful authority or excuse a coin resembling a current gold coin. It is possible that an indictment might have been laid under this section, but the fact that the prosecution have an alternative charge open does not preclude an indictment under s 5 (3) if it is applicable. The origin of s 8 of the 1936 Act is to be found in its predecessor, i.e., the Counterfeit Medal Act 1883, which, as its title suggests, is primarily concerned with medals, although it is true that coins are also mentioned. This argument for the appellant did not impress me.

There is no case directly in point, but *R v McMahon* (1) has a bearing. In that case the accused had three counterfeit coins in his possession which he intended not to part with but to keep and use for the purpose of cheating. He was found not guilty of the offence of being in possession of the coins with intent to utter them (a similar provision to s 5 (3) of the Coinage Offences Act 1936). The decision was, in my view, perfectly correct as the accused never intended to part with the possession of the coins. That would have defeated his object as they were double headed or tailed coins. Some observations of FOSTER J were relied on by the appellant's counsel. These were:

'We think, however, that an uttering must at least amount to a holding forth of the thing uttered as valuable or efficient for the purpose for which the genuine article is valuable or efficient, in the same way as a genuine article would be efficient, although the thing uttered need not be absolutely parted with. After careful consideration, we think coin implies using it as current coin for the purpose of currency . . .'

These observations, however, were obiter and on the views which I hold I think they were wrong.

A significant result of the appellant's contention is that if he imported these counterfeit coins into the United Kingdom (as he said they came from Italy) he would be liable to 14 years' imprisonment under s 70 of the 1936 Act, but if he is found in possession of them with the intention of dealing with them, he commits no offence under s 5 (3). This is a startling result and one which for my part I cannot think was intended by Parliament.

My view on the whole matter is that the construction of s 5 is perfectly plain and that if a person is in possession of counterfeit coins knowing them to be counterfeit with the intention of dealing with them, although not of passing them off as current coin of the realm, he is guilty of an offence under s 5 (3) of the 1936 Act. The history of the legislation and the authorities do not persuade me that this construction of s 5 is wrong. The deputy chairman's ruling was, in my view, correct, and the Court of Appeal were right in upholding it. I would dismiss the appeal.

**LORD PARKER OF WADDINGTON:** I have had the advantage of reading the speech of my noble and learned friend, LORD CROSS OF CHELSEA, with which I agree. I would therefore allow the appeal.

**LORD WILBERFORCE:** I have had the benefit of reading in advance the opinion prepared by my noble and learned friend, LORD CROSS OF CHELSEA. I agree with it and would allow the appeal.

(1) (1894), 15 NSWLR 131; 10 NSWWN 204.

**LORD SIMON OF GLAISDALE:** I have had the advantage of reading the speech of my noble and learned friend, LORD GUEST. I agree with it; and for the reasons given therein I too would dismiss the appeal.

**LORD CROSS OF CHELSEA:** The appellant Arthur John Selby was charged with possessing counterfeit coin contrary to s 5 (3) of the Coinage Offences Act 1936, the particulars of the offence being stated to be that on 24th February 1970 he had in his possession 45 fake or counterfeit coins resembling current gold coins knowing the same to be false or counterfeit and with intent to utter or put off the said coins or some of them. He was tried at the Inner London Sessions on 9th and 10th September 1970. On the latter day he was found guilty of the offence with which he was charged and sentenced to imprisonment for two years, the sentence to run concurrently with a sentence of eighteen months' imprisonment for receiving imposed on him at Surrey Quarter Sessions in August 1970. He appealed to the Criminal Division of the Court of Appeal against both his conviction and his sentence. His appeal was dismissed on 1st April 1971, but the court granted him leave to appeal to this House against the dismissal of his appeal against conviction.

The facts of the case are simple and can be stated quite shortly. On 24th July 1970 detective officers armed with a search warrant entered a house in the East End of London where the appellant lived. In a box they found 45 coins, all purported to have been minted in 1917 and having the appearance of United Kingdom sovereigns, but being, in fact, counterfeit. When asked what they were, the appellant replied: 'Don't worry about them, they're alright. They're all snide'. Asked what 'snide' meant, he said: 'Well they're not real, they're snide. Those Italian ones'. When asked what he did with them, he replied: 'That's my living, I deal in them . . . There's nothing wrong in them, they're all legal like'. At the police station he added:

'I told you they're imitation. I know a bit about them. I've got them, but I haven't uttered them with intent to deceive, because I always say they are imitation.'

Later, he said that he had been selling such coins for a few weeks, that the 45 coins found were a fresh batch, that they came from Italy and could be bought anywhere, adding that jewellers could sell them as 'genuine reproductions', as he did.

The Crown called no evidence to disprove the appellant's assertion that he always told those to whom he sold similar coins that they were imitations and at the close of the case for the prosecution his counsel submitted that there was no case for him to answer since there was no evidence that he intended to pass the counterfeit coins found in his possession or any of them as genuine. The deputy chairman (Murray Buttrose Esq) overruled that submission and directed the jury that as the appellant admittedly intended to part with the coins found in his possession which he knew to be counterfeit he was guilty of the offence with which he was charged even though he may not have intended to dispose of the coins as genuine coins. The Criminal Division of the Court of Appeal held that that direction was right but certified that the question: What is meant by the words 'intent to utter?' in s 5 (3) of the Coinage Offences Act 1936 was a point of law of general public importance which should be considered by this House.

The parts of s 5 of the Act which are relevant to the determination of the question provide as follows:

'(1) Every person who tenders, utters or puts off any false or counterfeit coin resembling any current coin knowing it to be false or counterfeit, shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment for a term not exceeding one year.

'(2) Every person who tenders, utters or puts off any false or counterfeit coin resembling any current gold or silver coin, knowing it to be false or counterfeit, and—(a) at the time of the tendering, uttering or putting off has in his possession, besides that coin, any other such false or counterfeit coin; or (b) on the day of the tendering, uttering or putting off, or within the period of ten days next following, tenders, utters or puts off any other such false or counterfeit coin, knowing it to be false or counterfeit; shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment for a term not exceeding two years.

'(3) Every person who has in his possession three or more false or counterfeit coins resembling any current gold or silver coin, knowing them to be false or counterfeit and with intent to utter or put off the said coins or any of them, shall be guilty of a misdemeanour and on conviction thereof liable to penal servitude for a term not exceeding five years or less than three years . . .

'(6) Every person who, with intent to defraud, tenders, utters or puts off as or for any current gold or silver coin—(a) any coin not being that current coin and being of less value than that current coin; or (b) any medal or piece of metal or mixed metals resembling in size, figure and colour that current coin and being of less value than that current coin; shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment for a term not exceeding one year.'

The section, it will be seen, uses three different expressions, 'tender', 'utter' and 'put off', none of which is defined in the Act, to describe dealings or intended dealings with coins. All three occur in sub-ss (1), (2) and (6) but only the two latter in sub-s (3). The offences dealt with by these subsections became statutory offences at different dates—those covered by sub-ss (1) and (2) in 1743, that covered by sub-s (3) in 1832 and those covered by sub-s (6) in 1861. But before considering what light is thrown on the question before us by the legislative history or by decided cases, I ask myself what meaning (if any) I would attribute to each of the three expressions as a matter of the ordinary use of language in the context of dealings with counterfeit coins. The word 'tender' clearly imports a holding out of the coin in question as a genuine coin. The expression 'put off' is not one which would be ordinarily used nowadays to describe a dealing with a counterfeit coin and I would have no clear idea what was meant by it in that context. It was not, however, suggested in argument by either side that there was any distinction relevant to the decision of this case to be drawn between 'uttering' and 'putting off'. In particular, counsel for the Crown did not suggest that if the appellant had not an intent to 'utter' the coins in his possession because he did not intend to pass them as genuine coins he nevertheless had an intention to 'put them off' within the meaning of that expression as used in s 5. As is shown by the terms of the certificate granted by the Court of Appeal the whole controversy centred on the meaning of the word 'utter'. 'Utter' is, perhaps, not a word which an ordinary man with no legal training would use at all in connection with a counterfeit coin; but a lawyer who had made no special study of coinage law would, I think, suppose that 'uttering' a counterfeit coin meant passing it or trying to pass it as genuine. Certainly if I had been told before I sat on this appeal that if I gave or sold to a coin collector, as a curiosity, a bad florin which I had been given in change I was guilty of a criminal offence of uttering a counterfeit coin I would have been surprised. My surprise, I am glad to see, would have been shared by the members of the Court of Appeal of New South Wales who decided the case of *R v McMahon* (1). The statutory provision there in question was in similar terms to s 5 (3) of the 1936 Act but the facts of the case were totally different and the actual decision is not inconsistent with the contentions of the Crown on this appeal. But although their language may have been wider than was necessary for the decision it is noteworthy that they said:

(1) (1894), 15 NSWLR 131; 10 NSWWN 204.

'After careful consideration we think uttering coin implies using it as current coin for the purpose of currency.'

I turn now to consider whether the history of the legislation or the decided cases show that the word 'utter' in s 5 is used not in what I take to be its *prima facie* sense of passing or trying to pass as a genuine coin but in the wider sense of 'parting with'. To counterfeit the King's money was treason under the statute of 1351 and those who took a hand in passing the counterfeit money into circulation by arrangement with the counterfeiter were themselves guilty of treason as abettors or accessories. But if a man who could not be shown to be the counterfeiter or in league with him passed coin which he knew to be counterfeit as genuine coin he was, before the passing of the statute 15 Geo 2 c 28 (1742-43), only liable to be punished for a common law cheat. Sections (II) and (III) of that statute were in the following terms:

'(II). And whereas the uttering of false money, knowing it to be false, is a crime frequently committed all over the kingdom, and the offenders therein are not deterred, by reason that it is only a misdemeanor, and the punishment very often is but small, though there be great reason to believe that the common utterers of such false money are either themselves the coiners, or in confederacy with the coiners thereof: for preventing whereof, Be it hereby further enacted by the authority aforesaid, That if any person whatsoever shall, after the said twenty-ninth day of September, utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons, and shall be thereof convicted, such person so offending shall suffer six months imprisonment, and find sureties for his or her good behaviour for six months more, to be computed from the end of the said first six months; and if the same person shall afterwards be convicted a second time of the like offence of uttering or tendering in payment any false or counterfeit money, knowing the same to be so, such person shall, for such second offence, suffer two years imprisonment, and find sureties for his or her good behaviour for two years more, to be computed from the end of the said first two years; and if the same person shall afterwards offend a third time in uttering or tendering in payment any false or counterfeit money, knowing the same to be so, and shall be convicted of such third offence, he or she shall be and is hereby adjudged to be guilty of felony, without benefit of clergy.

'(III). And it is hereby further enacted by the authority aforesaid, that if any person whatsoever shall after the said twenty-ninth day of September utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons, and shall either the same day, or within the space of ten days then next, utter or tender in payment any more or other false or counterfeit money, knowing the same to be false or counterfeit, to the same person or persons, or to any other person or persons, or shall at the time of such uttering or tendering have about him or her, in his or her custody, one or more piece or pieces of counterfeit money, besides what was so uttered or tendered, then such person so uttering or tendering the same, shall be deemed and taken to be a common utterer of false money, and being thereof convicted, shall suffer a year's imprisonment, and shall find sureties for his or her good behaviour for two years more, to be computed from the end of the said year; and if any person having been once so convicted as a common utterer of false money, shall afterwards again utter or tender in payment any false or counterfeit money to any person or persons, knowing the same to be false or counterfeit, then such person being thereof convicted shall for such second offence be and is hereby adjudged to be guilty of felony without benefit of clergy.'



The statute—as is pointed out by Christian in Blackstone (1809, vol 4, p 99, note 2)—did not create any new offence but simply provided that what had before been a common law misdemeanour with no fixed penalties should henceforth be a statutory offence carrying fixed penalties of varying severity to match varying degrees of criminality.

An intention to deceive was of the essence of the common law offence and so indictments under the statute always alleged that the accused uttered a counterfeit coin to AB deceitfully as and for a good coin knowing the same to be counterfeit (see e.g. Archbold's Criminal Pleading (2nd edn, 1825, pp 272, 273)). To part with a counterfeit coin to someone as a counterfeit coin would not have been an offence at common law, and, as I see it, it was not made an offence by this statute.

In 1832 the Coinage Offences Act, 1832, was passed to consolidate and amend the laws against offences relating to coin. Section I repealed a large number of earlier statutes which created coinage offences, including the statute 15 Geo 2 c 28. Section VII which was plainly intended to replace the provisions of ss ii and iii of the earlier Act was in the following terms:

'And be it enacted, That if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, beside the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any more or other false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be imprisoned for any term not exceeding two years; and if any person who shall have been convicted of any of the misdemeanors, or crimes and offences, herein-before mentioned, shall afterwards commit any of the said misdemeanors, or crimes and offences, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.'

Section VIII, which is the ancestor of s 5 (3) of the Act of 1936 and created a new offence, was in the following terms:

'And be it enacted, that if any person shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any



term not exceeding three years; and if any person so convicted shall afterwards commit the like misdemeanor, or crime and offence, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.'

It will be observed that while the statute of 1742 spoke of 'uttering' or 'tendering in payment' the statute of 1832 speaks of 'uttering or putting off', but, as I have said, it has not been suggested that this change of language made any difference to the substance of the offence and so it would seem that it was not an offence under s VII or s VIII of the 1832 Act to part with or to intend to part with a counterfeit coin as a counterfeit coin.

This was the view of LORD ABINGER CB as appears from *R v Page* (1). There the prisoners, who were man and wife, had given a bad half-a-crown to a beggar and when they were arrested the husband was found to have another bad coin in his mouth. They were charged under s VII of the Act of 1832 with uttering a counterfeit coin knowing it to be counterfeit. LORD ABINGER CB directed an acquittal saying:

'This in my judgment is no uttering within the statute. The giving away half-a-crown in charity cannot be with intent to defraud as nothing was received in exchange... Although in the statute there are no words with respect to defrauding yet in the proof it is necessary in my opinion to go beyond the mere words of the statute and to shew an intention to defraud some person. There might be cases of a party giving a person a counterfeit piece of money, and at the same time telling that person that it is bad, and yet he would still be liable to be convicted on an indictment like the present, if a case falling within the mere words of the statute were sufficient. I take it that the uttering must either be with intent to defraud the party receiving the piece of money or with intent that that party should pass it as agent of the utterer.'

The actual ruling in that case is obviously open to criticism, for although the beggar was not defrauded of anything he was deceived by being given a bad coin as a good one—a deception which might have landed him in serious trouble. In 1845 in *R v* — (2) where the prisoner had given a counterfeit sovereign to a girl with whom he had had intercourse, LORD DENMAN CJ, while distinguishing *R v Page* as a case of charity, expressed doubt as to its correctness, and in 1852 in *R v Ion* (3) ALDERSON B said in argument that *R v Page* had been 'overruled'. But I do not think that either LORD DENMAN CJ or ALDERSON B was intending to disagree with LORD ABINGER CB when he said that a man who gave another a counterfeit shilling telling him that it was counterfeit would not be guilty of an offence under s VII of the 1832 Act.

In 1861 the Coinage Offences Act, 1861, was passed to consolidate and amend the law relating to coinage offences. Sections VII and VIII of the 1832 Act reappear as ss 9 to 12 of the 1861 Act. Section 13, which is the ancestor of s 5 (6) of the 1936 Act and created a new offence, was in the following terms:

'Whosoever shall, with intent to defraud, tender, utter, or put off as or for any of the Queen's current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure, and colour the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal or mixed metals

(1) (1837), 8 C & P 122.

(2) (1845), 1 Cox CC 250.

(3) (1852), 16 JP 455.

so tendered, uttered, or put off being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour and with or without solitary confinement.'

Counsel for the Crown submitted that the fact that s 5 (6) of the 1936 Act expressly says that the tendering, uttering or putting off covered by it must be with intent to defraud shows that no dishonest intent is needed to constitute the offences created by s 5 (1) and (3). I am not myself impressed by that argument. In the first place, sub-s (6) only came into the code in 1861 and even if one could see no reason for the mention of an intent to defraud in s 13 of the 1861 Act despite the absence of any such mention in ss 9 to 12, I would not think that that circumstance would justify me in putting on ss 9 to 12 a meaning which their predecessors had not borne in the earlier legislation. But in fact it is not hard to see a reason for the express reference to intent to defraud in s 13. That section was not concerned with counterfeit objects at all. It was (to concentrate for simplicity on coins) dealing with a genuine coin which happened to resemble a current coin which was worth more; and it made it an offence to pass off that genuine coin as the similar current coin which was worth more. If a man tenders in payment a coin which he knows to be counterfeit he must necessarily have an intent to defraud; but he might tender a gold 'Napoleon' as a sovereign by mistake. If what is tendered or uttered is itself a genuine coin you must make it clear that there will be no offence unless the tenderer or utterer is acting dishonestly and intends the coin to be taken for a different genuine coin of greater value. The words 'with intent to defraud' in sub-s (6) perform the same purpose as the words 'knowing it to be false or counterfeit' in the other subsections.

In 1883 an Act, the Counterfeit Medal Act, 1883, was passed the title of which was 'An Act for preventing the sale of medals resembling current coin'. That Act is reproduced with certain immaterial amendments in s 8 of the Act of 1936 which provides as follows:

'8. Every person who, without lawful authority or excuse (the proof whereof shall lie on the person accused), makes, sells, offers for sale or has in his possession for sale, any medal, cast, coin, or other like thing made wholly or partially of metal or any mixture of metals, and either—(a) resembling in size, figure and colour any current gold or silver coin; or (b) having thereon a device resembling a device on any such current coin; or (c) being so formed that it can, by gilding, silvering, colouring, washing or other like process be so dealt with as to resemble any such current coin; shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment for a term not exceeding one year.'

It would appear both from the title and the wording of the Act that it was not really aimed at coins which were made to resemble current coins but with genuine medals and other objects which resembled or could readily be made to resemble current coin. There is, however, no doubt that the word 'coin' covers counterfeit coin and so, unless he could have shown that he had lawful authority or excuse for what he was doing, the appellant could have been convicted under s 8 of the 1936 Act. In 1935 another coinage offences Act, the Counterfeit Currency (Convention) Act, 1935, was passed to the terms of which it is not necessary to refer, and on 21st May 1936 the present Act was passed consolidating the provisions of the Acts of 1861, 1883 and 1935.

We were referred in argument to a number of other sections in the 1936 Act besides ss 5 and 8—ss 1 to 4 which deal with counterfeiting or altering current coin; s 6 which deals with buying or selling counterfeit coin for less than its denomination; and s 7

which deals with the export and import of counterfeit coins. The code has grown up in a haphazard fashion over the centuries and it cannot be said that it is an entirely logical structure either as regards what acts will or will not constitute offences or as to the scale of penalties. But although the examination of other sections revealed possible anomalies I do not think that any light is thrown by them on the meaning of s 5. We were also referred to the Forgery Act 1913, and in particular s 6 (2), which makes it clear that an intention to deceive or defraud is a necessary ingredient in the offence of uttering a forged document. But the difference in the subject-matters makes it, to my mind, impossible to draw any conclusions as to the meaning of 'uttering' in the Coinage Offences Act 1936 from the provisions of the Forgery Act 1913.

It is perhaps worth observing that Archbold's Pleading, Evidence and Practice (27 edn, 1969, para 3129)—published before the decision in this case—states:

'It is submitted that to be within the statute [i.e. s 5 (1) of the 1936 Act] the uttering must at least amount to a holding forth of the thing as current coin for the purpose of currency.'

It appears that in two cases tried at the Old Bailey shortly before this case, where the facts were similar, the judges held that no offence was committed under s 5 (3) and that this is the first case where the Crown has secured a conviction under that subsection on facts of this sort. We were told that pending the determination of this appeal it has become the practice of the Crown to lay charges in the alternative both under ss 5 (3) and 8.

In the Court of Appeal the argument for the appellant seems not to have been the simple one presented to us—namely, that a man is not guilty of 'uttering' a counterfeit coin unless he passes or tries to pass it as genuine. It was what is, to my mind, a less plausible argument—namely, that there should be implied in the section a provision that the accused is not guilty unless he acts dishonestly, so that a man who disposes of a coin which he knows to be counterfeit to someone whom he tells that it is counterfeit is not guilty of an offence unless he anticipates that the recipient will himself pass it or try to pass it as genuine.

The Court of Appeal—although they thought that the point was a different one—upheld the conviction. In the light of the argument presented to us I think that the conviction was wrong. This is a penal enactment which should be construed strictly. To utter a counterfeit coin means, to my mind, *prima facie*, to pass it or try to pass it as genuine, and a study of the legislative history so far from leading me to think that the word is used in s 5 with something other than what I take to be its *prima facie* meaning confirms me in the view that it bears its *prima facie* meaning. I would, therefore, allow the appeal.

*Appeal allowed.*

Solicitors: *Sampson & Co; Director of Public Prosecutions.*

G.F.L.B.

<b>GAMING</b> - Betting - Office - Advertisement - 'Premises giving access to a licensed betting office' - Display of sign on outside wall - Sign showing company's registered name and containing words 'turf accountants' - Indication that premises were licensed betting office - Betting (Licensed Offices) Regulations, 1960, reg 2 - Betting, Gaming and Lotteries Act, 1963, s 10 (5) (a), (b). <b>Maurice Binks (Turf Accountants) Ltd v Huss</b> .. .. .	<b>QBD</b>	<b>148</b>
<b>GAMING</b> - Forecast of future event - Photograph of players taken during football match - Ball not in photograph - Competitors required to mark most likely position of ball - Position later chosen by panel of judges - Success of competitors marking positions closest to that chosen by panel - Betting, Gaming and Lotteries Act, 1963, s 47 (a) (i). <b>Ladbroke (Football) Ltd v Perrett</b> .. .. .	<b>QBD</b>	<b>181</b>
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